Supreme Court, U.S.
FILED

No. 011701 MAY 17 2002

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In The

Supreme Court of the United States

JOHN THOMAS CLOUD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petition For Writ Of Certiorari

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Questions Presented

Issue No. 1: Whether a debtor "commences an action" within the meaning of 11 U.S.C. 108(a) when he presents an FTCA administrative claim, or whether the Bankruptcy Code provision contemplates that a debtor "commences an action"solely by filing suit.

Issue No. 2: Whether dismissal of a criminal cause on the basis of prosecutorial misconduct, standing alone, charges a claimant with "awareness of the connection between the wrongful indictment and the defendant's misconduct" such that a claim for malicious prosecution accrues upon acquittal.

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JOHN THOMAS CLOUD,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Fifth Circuit
Case No. 01-20079

John Thomas Cloud petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit

Citations to the Opinions and Orders Entered Below

The opinion of the Fifth Circuit Court of Appeals is reported at 281 F.3d 158 (5th Cir. 2001) (**Pet. App. A**) The opinion of the trial court in the civil suit for malicious prosecution, *Cloud v. U.S.*, is reported at 126 F. Supp.2d 1012 (S.D. Tex. 2000)(**Pet. App. B**) The opinion of the trial court dismissing the criminal cause against Cloud and others, *U.S. v. Ramming, et al.* is reported at 915 F.Supp. 854 (S.D. Tex. 1996). (**Pet. App. C**). The opinion of the trial court in the consolidated civil suit for malicious prosecution, *Ramming v. U.S.*, is not reported. (**Pet. App. D**) The order of the Fifth Circuit Court of Appeals denying Appellant's Motion for Rehearing is not reported. (**Pet. App. E**)

Jurisdiction

The United States District Court for the Southern District of Texas exercised jurisdiction over this cause pursuant to 28 U.S.C. §1331. The Fifth Circuit exercised jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. This Court has jurisdiction as follows:

On December 22, 2000, the district court granted the Government's FED.R.CIV.P. 12 motion to dismiss. Cloud timely filed his notice of appeal with the United States Court of Appeals for the Fifth Circuit on January 18, 2001. The Fifth Circuit affirmed the district court judgment on December 19, 2001. Appellant timely filed his motion for rehearing in a cause involving the United States on February 4, 2002, which was denied on February 18, 2002. Petitioner timely files this Petition for Writ of Certiorari prior to May 19, 2002.

This Court has jurisdiction over Cloud's Petition for Writ of Certiorari because the United States Court of Appeals for the Fifth Circuit has entered a decision in conflict with decisions of district and courts of appeals on the same important matter; to wit, interpretation and administration of 11 U.S.C. § 108 of the Bankruptcy Code concerning the tolling of statutes of limitations provided by other nonbankruptcy laws.

Federal Statutes Involved

28 U.S.C. § 2401, Time for Commencing Action Against U.S., provides:

> (a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2675, Disposition by Federal Agency as Prerequisite; evidence, provides:

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

11 U.S.C. § 108, Extension of Time, provides:

(a) If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of–

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) two years after the order for relief.

(b) Except as provided in subsection (a) of this section, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1201 or

1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of–

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 60 days after the order for relief.

(c) Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of–

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

Statement of the Case

A. Course of Proceedings and Disposition in Court Below

This malicious prosecution cause arises from the criminal prosecution (*U.S. v. Ramming, et al.)* and subsequent acquittal of Appellant Thomas J. Cloud ("Cloud") and co-plaintiff below Lawrence H. Ramming ("Ramming") (Opinion at Pet. App.C). Following their acquittal, Cloud and Ramming filed separate civil actions for malicious prosecution; the district court consolidated the cases. The district court first dismissed Ramming's claims on July 27, 2000, granting the Government's FED.R.CIV.P. 12(b) motion. (Pet. App. D). On December 22, 2000, in a published decision, the district court granted the Government's same motion as to Cloud's claims, incorporating much of the reasoning underlying the earlier Ramming dismissal. (Pet. App. B) Cloud timely filed his notice of appeal on January 18, 2001. Ramming did not appeal.

The Fifth Circuit Court of Appeals affirmed the judgment of the district court holding, as a matter of law, that (a) a debtor's time for complying with § 2401 of the FTCA is tolled six months under § 108(b), rather than 24 months under §§ 108(a); and (b) this FTCA claim for malicious prosecution accrued on the date of the judgment of acquittal because the acquittal arose from prosecutorial misconduct. (Pet. App. A) The decision was subsequently ordered published. The Fifth Circuit denied Cloud's motion for rehearing. (Pet. App. E) Cloud now files this Petition for Writ of Certiorari.

B. Statement of Facts

In 1994, the United States of America obtained a 27-count indictment against Cloud and others (including co-plaintiff Ramming) arising from alleged bank fraud, money laundering, etc. *See U.S. v. Ramming*, 915 F.Supp. 854 (S.D.

Tex. 1996) (Pet. App. C) After receiving all evidence in the case, the district court entered January 12, 1996, judgment of acquittal in favor of all defendants without putting the issues to the jury. *See U.S. v. Ramming*, 915 F.Supp. 854 (S.D. Tex. 1996) (Pet. App. C) Judge Hoyt's written opinion grants Defendants' motion to dismiss based upon prosecutorial misconduct, associated primarily with *Brady* violations; significantly, his opinion also *denies* defendants' motion to suppress because he finds that *probable cause* existed. *Id.* at 867. (Pet. App. C)

On November 26, 1997, Cloud filed his Chapter 11 petition in bankruptcy and became a debtor in possession. The undisputed evidence shows that in December, 1998, Cloud first learned that grand jury transcripts from *U.S. v. Ramming* had been released and that those transcripts revealed the prosecution's prior malicious intent to pursue a groundless indictment against Cloud and the others. On March 18, 1999, Cloud sent his administrative claim to the Government. On October 20, 1999, the Government sent Cloud's counsel notice that the administrative claim was denied. On December 30, 1999, Cloud filed this suit against the Government.

Reasons for Granting the Writ

Issue No. 1 **Whether a debtor "commences an action" within the meaning of 11 U.S.C. § 108(a) when he presents an FTCA administrative claim, or whether the Bankruptcy Code provision contemplates that a debtor "commences an action"solely by filing suit.**

Section 108 of the Bankruptcy Code extends the time periods within which a debtor may take certain legal action or have such action taken against him/her. The dispute here turns upon whether the debtor's deadlines under the FTCA are extended by the two-year tolling provision of the Code (§ 108(a)) or by the six-month tolling provision of the

Code (§ 108(b)). More specifically, the question is whether a debtor "commences an action" within the meaning of 11 U.S.C. § 108(a) when he presents an FTCA administrative claim, or whether the Bankruptcy Code provision contemplates that a debtor "commences an action"solely by filing suit.

A. Conflicting Case Authority

District and appeals courts present conflicting decisions on the construction of 11 U.S.C. §§108(a) and 108(b). One line of cases, beginning more than fifty years ago, holds that when the nonbankruptcy limitations period at issue constitutes a condition precedent to suit, the two-year extension applies. In *Engstrom v. De Vos*, 81 F.Supp. 854 (D.C.E.D. Wash. 1949), the court construed 11(e)[1], to

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1 Section 11(e), the predecessor to 108, provided that:

> A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings on behalf of the estate upon any claims against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. Where by any agreement, a period of limitation is fixed for instituting a suit or proceeding upon any claim, or for presenting or filing any claim, proof of claim, proof of loss, demand, notice, or the like, or where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in such proceeding or by applicable Federal or State law, for taking any action, filing any claim or pleading, or doing any at, and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy, the receiver or trustee of the bankruptcy may, for the benefit of the estate, take any such action or do any such act, required of or permitted to the bankrupt, within a period of sixty days subsequent to the date of adjudication or within such further period as may be permitted by the agreement, or in the proceeding or by applicable Federal or State law, as the case may be. 11 U.S.C. § 11(e).

preserve the trustee's right to recover an alleged unlawful preference. The trustee sued under a state statute which allowed recovery of a preference made by an insolvent corporation. *Id.* at 856. The statute limited the right of action, however, by requiring that the preference occur within four months of the date of the application for appointment of trustee, and that the action be commenced within six months thereafter. *Id.* The court found that § 11(e) superceded these limitations. *Id.* at 859. Because of Congress's broad power in the field of bankruptcy to alter both procedural and substantive rights, the time period for exercise of the trustee's right of action was extended two years. *Id.*

Agreeing with *Engstrom*, the Fifth Circuit later concluded that provisions of substantive right, that is, statutes containing conditions precedent to recovery, are tolled by § 108(a). *See Dower v. Bomar*, 313 F.2d 596, 599 (5th Cir. 1963). At that time, the *Dower* court rejected the narrow reading of "commenced" as applying to statutes of limitation alone; instead, the Court determined that the time period within which the debtor had to declare a loan as usurious, though a condition precedent to penalties and forfeiture, was tolled for two years by § 11(e), the predecessor to 108(a). *Id.*

Articulating the difference between the two tolling statutes, one court writes that §108(a) governs limitations periods that are statutory prerequisites and §108(b) governs the other extensions of time. *See Weiner v. Sprint Mortgage Bankers Corp.*, 235 A.D. 2d 472, 652 N.Y.S. 2d 629 (Supreme Court, App. Div., 2d 1997) (holding that "[w]hen a Statute of Limitations also constitutes a 'statutory prerequisite' the extension of time in bankruptcy is governed by 11 U.S.C. § 108(a)"). The *Weiner* court notes that "[w]here the time limit in issue does not require the commencement of an action within that period, the extension of time in bankruptcy is governed by [the six-month provision,] 11 U.S.C. § 108(b)." *Id.* at 631. The FTCA, by contrast, does require

commencement of an action within the periods outlined in 11 U.S.C. § 2401. Therefore, under the *Weiner* analysis, §108(a) governs.

Most courts agree with the *Weiner* analysis. Section 108(a) tolls statutory time periods when such time periods constitute a condition precedent to asserting a cause of action. *See T.C.I, Ltd. v. Sears Bank & Trust Co*, 21 B.R. 876 (Bankr. N.D. Ill. 1982). Because presentment of an administrative claim is a prerequisite to a Federal Tort Claims Act suit, the tolling provision of 11 U.S.C. §108(a) should apply.

There are two courts that differ: The Fifth Circuit, in this case and *TLI, Inc. v. U.S.*, 100 F.3d 424 (5th Cir. 1996), and the D.C. Circuit in *Eagle-Picher Industries, Inc. v. United States*, 937 F.2d 625, 639 (D.C. Cir. 1991).[2] These cases depart dramatically in their analysis of the Bankruptcy Code tolling provisions. Instead of focusing upon the purposes of the statutes, these courts turn to a non-scientific analysis of "commence an action."

In *Eagle-Picher*, the Court examined the timeliness of asbestos manufacturer GNR's FTCA claims seeking contribution and indemnity from the Government for shipyard workers' asbestos-injury claims. *Id.* GNR argued that its voluntary petition for bankruptcy tolled its obligation to meet § 2401 for two years. *Id. Eagle-Picher*, too, resolved the question against the debtor and held that the debtor's deadlines under § 2401 of the FTCA were governed by the six-month provision of 11 U.S.C. § 108(b), rather than 108(a).

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[2] The *Eagle-Picher* decision was not referenced by the Fifth Circuit Court of Appeals in this case, though it was relied upon by the district court below.

Eagle-Picher was not resolved based upon statutory interpretation. Rather, the basis for Judge Ginsburg's opinion in *Eagle-Picher* was the conclusion that FTCA presentment is more like a proof of claim than a lawsuit because "presentment requires only 'minimal notice,'" and is, therefore, "far less costly and far easier than the initiation of an action against a nongovernmental tortfeasor." *Id.* at 322.

The *Eagle-Picher* court could not be more wrong about presentment of an FTCA claim. Proper compilation of an administrative claim for presentment under the FTCA is actually *more onerous* than filing suit. Filing suit under FED.R.CIV.P. 8 and 11 requires that the trustee/plaintiff prepare a short, plain statement of the claim that is warranted by existing or anticipated law and is supportable by evidence. On the other hand, the FTCA commands that the administrative claim be in writing to the appropriate federal agency. 28 U.S.C.A. § 2675(a). Therefore, the trustee must investigate to determine the appropriate federal agency.

Further, the applicable federal regulations require submission of: (1) evidence of authority - 28 C.F.R. § 14.3; and (2) a demand for a sum certain, to which the claimant is bound in the future - 28 C.F.R. § 14.2(a). Most plaintiffs do not demand a sum certain until closing argument at trial. But, the trustee must do so upon the presentment of a FTCA administrative claim.

Finally, 28 C.F.R. § 14.4 outlines the types of **evidence** that the trustee must submit in support of the administrative claim. For a personal injury claim, for example, § 14.4(b) requires:

(1) a report from the claimant's attending physician;

(2) itemized bills for medical expenses incurred;

(3) a statement of anticipated future medical expenses;

(4) an employer statement of actual time/wage lost.

The process for preparing a claim under the FTCA is far more complex, and time consuming, than filing a lawsuit. *See, generally,* "When is a Claim Properly Presented to Federal Agency, Under 28 U.S.C.A. § 2675(a), for Purposes of Satisfying Prerequisite to Subsequent Suit Under Federal Tort Claims Act," 73 A.L.R. Fed. 338 (1999 Supp.). In short, to file a federal suit, a trustee/plaintiff must have a good faith basis for the claim; to file a FTCA claim, a trustee/plaintiff must already possess *prima facie* evidence. Thus, the factual underpinnings of the *Eagle-Picher* court's conclusion was completely flawed.

The Fifth Circuit's decisions are similarly flawed for their lack of *bona fide* analysis of the purposes of the statutes. Both here and in *TLI* the Fifth Circuit provides no explanation for departing from prior case law, including its own. The Fifth Circuit cites no change in legislative language or purpose to support its new view that "commence" no longer encompasses both the filing of suit and the satisfaction of conditions precedent to filing suit.

The more pointed error in construction of the specific statutes here is the utter disregard for the language of the FTCA. The Court did not need to guess when an FTCA action commences; Section 2401 of the FTCA, regarding both presentment and filing suit, is entitled "Time for Commencing Action Against United States." Section 108(a) was intended by Congress to provide a trustee with two additional years to "commence the action"; that same Congress described commencing an action under the FTCA

as a two-step process: (1) presenting the claim to the agency; and (2) filing suit if the agency denies the claim. The Fifth Circuit ignored that plain language and resorted to § 108(b).

The six-month tolling of subsection (b) was intended by Congress to be a residual provision that gives the trustee 60 days to perform acts not covered under subsection (a)." *See* Collier on Bankruptcy 108.02, p. 108-5. The House Judiciary Report accompanying the Bankruptcy Act specifically refers to insurance claims as an example of the type of claim entitled to a sixty-day extension. *Id.* Courts following the legislature's example have generally applied the six-month tolling of § 108(b) to matters that are outside of the context of litigation:

> *Counties Contracting & Const. v. Const. Life Ins. Co.*, 855 F.2d 1054 (3d Cir. 1988) (applying 108(b) to statutory grace period for payment of insurance policy premiums);
>
> *Johnson v. First Nat. Bank, Montevideo, Minn.*, 719 F.2d 270 (8th Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984)(applying 108(b) to redemption of mortgaged property);
>
> *In re Santa Fe Development & Mortg. Corp.*, 16 B.R. 165 (Bankr. 9th Cir. 1981) (applying 108(b) to options to purchase property);
>
> *In re Lauderdale Motorcar Corp.*, 35 B.R. 544 (Bankr. S.D. Fla. 1983) (applying 108(b) to the curing of any default under an agreement).

The legislative history supports but one construction of the Bankruptcy tolling provisions as applied to the Federal Tort Claims Act: Section 108(a) provides two years from the date of a voluntary bankruptcy petition in which to present a claim to the appropriate government agency.

B. Public Policy

Public policy demands that § 108(b) apply to presentment of claims under § 2401(b). The core purpose of bankruptcy law is to augment or maximize the value of the bankruptcy estate. *See Commodity Futures Trading Comm'n v. Weintraub,* 471 U.S. 343, 351-354 (1985). Section 108 fundamentally serves that purpose because it gives breathing room to take legal action–action otherwise barred by limitations– to enhance the assets of the estate. However, the Fifth and D.C. Cir. construction of the statutes gives the trustee two years to file suit, but six months to present an FTCA claim. Clearly, **a two year extension for filing an FTCA suit is meaningless if the suit is barred upon the failure to muster an administrative claim in sixty days.**[3]

C. The Law as Applied to Cloud's Claims

The following are undisputed facts that, when applied to the law and policy above, show that Cloud's bankruptcy petition tolled the time period to present his administrative claim until November, 1999, even if Cloud's cause of action accrued no later than the date of acquittal.

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[3] Sixty days actually represents the maximum amount of time allotted. Since the tolling provisions of § 108 run from the date of the filing of the petition, not from the date of the appointment of the trustee, what appears to be a sixty-day tolling for presentment of an FTCA claim is really a sixty-day tolling for appointment of a trustee and presentment of an FTCA claim. *See* 11 U.S.C. § 108(b).

Date	Undisputed Facts
January 12, 1996	Judge Hoyt grants a motion for judgment of acquittal and a motion to dismiss for prosecutorial misconduct. *See U.S. v. Ramming*, 915 F.Supp. 854 (S.D. Tex. 1996).
November 26, 1997	Cloud files a Chapter 11 petition in bankruptcy and subsequently becomes a debtor in possession.
March 18, 1999	Cloud sends his administrative claim to the Government.
October 20, 1999	The Government sends Cloud's counsel notice stating that the administrative claim is denied and he has six months to file suit.
December 30, 1999	Cloud files this suit against the Government.

The above time line shows that Cloud's deadline to commence the action expired to earlier than January 12, 1998. However, Cloud filed in Chapter 11 petition in bankruptcy prior to that date. Section 108(a) then provided Cloud with an additional two years to commence the action. So long as he commenced the action by November 26, 1999, his subsequent suit was timely.

As it is undisputed, and indisputable as the time line shows, that Cloud filed his lawsuit within six months after receipt of the final denial of his claim as required by 2401(b), the decision of the Fifth Circuit should be reviewed and reversed.

Issue No. 2 **Whether dismissal of a criminal cause on the basis of prosecutorial misconduct, standing alone, charges a claimant with "awareness of the connection between the wrongful indictment and the defendant's misconduct" such that a claim for malicious prosecution accrues upon acquittal.**

A. Federal Accrual of Claims

The statute of limitations and the accrual of claims are governed by federal law. *Brown v. NationsBank Corp.*, 188 F.3d 579 (5th Cir. 1999). Under federal law, a cause of action accrues or "the limitations period begins to run 'the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured.'" *Russell v. Board of Trustees*, 968 F.2d 489, 493 (5th Cir. 1992 (*quoting Helton v. Clements*, 832 F.2d 332, 335 (5th Cir. 1987)), *cert. denied*, 113 S.Ct. 1266 (1993). A plaintiff's awareness encompasses two elements: (1) The existence of the injury; and (2) causation, that is, the connection between the injury and the defendant's actions. *See Stewart v. Parish of Jefferson*, 951 F.2d 681, 684 (5th Cir.), *cert. denied*, 506 U.S. 820 (1992).

A plaintiff need not realize that a legal cause of action exists in order for the limitations period to begin; but the plaintiff does need to know the facts that would support the claim. *See Harrison v. United States*, 708 F.2d 1023, 1027 (5th Cir. 1983). Those facts must be of a quality to "lead a reasonable person (a) to conclude that there [is] a causal connection . . . or (b) to seek professional advice." *Id.*

To prevail on a malicious prosecution claim, the Fifth Circuit, applying Texas law, requires the plaintiff to show that:

(1) a criminal action was commenced against him;

(2) the prosecution was caused by the defendant or with his aid;

(3) the action terminated in the plaintiff's favor;

(4) the plaintiff was innocent;

(5) the defendant acted without probable cause;

(6) the defendant acted with malice in filing the charge; and

(7) the criminal proceeding damaged the plaintiff.

See Richey v. Brookshire Grocery Co., 952 S.W.2d 515, 517 (Tex. 1997); *see also, Taylor v. Gregg*, 36 F.3d 453, 455 (5th Cir. 1994).

Prosecutorial misconduct is a term that covers a wide spectrum of conduct including: (a) questioning by prosecutors that elicits inadmissible testimony; (b) questioning of defendant and defense witnesses that elicits prejudicial evidence; (c) questioning or making comments that improperly bolsters the credibility of prosecution witnesses; (d) offering false, inadmissible, or misleading evidence; (e) presenting false or misleading displays or demonstrations; (f) offering inflammatory evidence; (g) making false or misleading remarks; (h) making inflammatory remarks; (i) misstating the evidence; (j) disparaging defense counsel; and (k) asking questions or making comments that impair a defendant's exercise of his constitutional right to remain silent after being given Miranda rights are some examples *See* Gersham, Bennett, *Mental Culpability and Prosecutorial Misconduct*, 26 Am. J. Cr. L. 121, 128 (Fall 1998). Very little of this conduct approaches malicious prosecution.

B. The Law as Applied to Cloud's Claims

1. A judicial finding of "probable cause" is inconsistent with accrual of a malicious prosecution claim as a matter of law.

Until the decision in this case, no court had previously held that when a defendant obtains a judgment of acquittal based in part upon allegations of prosecutorial misconduct, his cause of action for malicious prosecution accrues as a matter of law. Here, the Fifth Circuit determined that "Judge Hoyt's unequivocal iteration of examples of prosecutorial misconduct leaves little doubt that, at the time of Appellant's acquittal, Appellant had ample evidence of essential facts which would support the possible existence of a claim for malicious prosecution." *Cloud v. U.S.*, 281 F.3d 158, 163 (5th Cir. 2001)(Pet. App. A). The Fifth Circuit overlooked the portion of Judge Hoyt's opinion that concluded that the Government proceeded with **probable cause**. See *U.S. v. Ramming*, 915 F.Supp. 854, 867 (S.D. Tex. 1996)(Pet. App. C).

Although the Fifth Circuit outlines a "litany of misconduct" that supported Judge Hoyt's decision to enter a judgment of acquittal, the Court did not point out that Judge Hoyt also denied defendants' motion to suppress, finding that "even if the affiant, FBI Agent Tom Conlon, included false statements in his affidavit for search warrant, there was sufficient other evidence to support probable cause for its issuance." *U.S. v. Ramming*, 915 F. Supp. 854, 867 (S.D. Tex. 1996)(Pet. App. C). Judge Hoyt further stated that Conlon's affidavit was "mistaken on the law." *Id.* Thus, Judge Hoyt stood firm on the existence of **probable cause**.

Also, the instances of prosecutorial misconduct outlined in Judge Hoyt's opinion and in this Court's opinion were overwhelmingly pre-trial and trial misconduct that were unrelated to securing Cloud's indictment. Thirteen of

fourteen pages of the decision outlined the inadequacies of the evidence mustered against the defendants at trial; thus, the Court granted the motion for judgment of acquittal. The remaining page addressed and granted defendants' motion to dismiss based upon allegations of prosecutorial misconduct. *Id.* at 867. Five of the eight grounds involved *Brady* violations (*i.e.* pre-trial misconduct) and the remaining three grounds involved opening statement actions and misrepresentations to the Court (*i.e.* **trial misconduct**).

Judge Hoyt's remaining remarks were directed toward his review of the Grand Jury testimony. Specifically, in outlining the prosecutorial infractions, Judge Hoyt concluded that the prosecution violated a duty "not [to] prosecute where the evidence at best is disputed." *Id.* at 868 *citing Berger v. U. S.*, 295 U.S. 78 (1935). *Berger* teaches that prosecutors have a unique obligation to ensure that "guilt shall not escape or innocence suffer." *Berger v. U.S.*, 295 U.S. at 88. However, to say that a prosecutor inappropriately pursued a weak case and used improper techniques to ensure a conviction in that weak case is not the same as saying that obtaining the indictment in the first instance was malicious prosecution. Such a leap is especially inappropriate where, as here, there is **probable cause** in the first instance.

C. The Record Evidence Forecloses Accrual at Acquittal as a Matter of Fact

John Thomas Cloud's unchallenged affidavit is part of the record below. In it, Cloud not only tells the facts of which he was aware from Judge Hoyt's opinion (acquittal and overzealous prosecution), he also describes the **facts** of which he was not aware. First, Cloud states that he did not know that "[t]he Government knew at the Grand Jury phase that it did not have sufficient evidence to prosecute and knew that witnesses were being threatened by the Government to persuade them to give false testimony."

As to the legal standard, Cloud did not possess any facts in support of at least two of the seven elements of a malicious prosecution claim: (1) that the defendant acted without probable cause; and, (2) that the defendant acted with malice in filing the charge. Specifically, Cloud outlines eight instances of factual information revealed by the grand-jury transcripts that, for the first time, alerted Cloud to the lack of probable cause to support the prosecution and the malice underlying the prosecution. Based upon the information in the grand-jury transcripts, Cloud testifies that it was not until December, 1998, that he suspected Government's bad motive in the *Ramming* prosecution.

Both courts below ignored this evidence in total. The Fifth Circuit relied solely upon excerpted portions of the judgment of acquittal to find accrual. *Cloud v. U.S.*, 281 F.3d 158, 163 (5th Cir. 2001)(Pet. App. A). The district court, on the other hand, characterized the "evidence" concerning accrual of Cloud's FTCA claim as the same as the evidence of co-plaintiff Ramming. *See Cloud v. U.S.*, 126 F.Supp.2d 1012 (S.D. Tex. 2000)(Pet.App. B). However, Ramming submitted no evidence at all regarding what he knew and when he knew it. *See Ramming v. U.S.* (Pet. App. D). By contrast, Cloud filed his own affidavit setting forth specific facts about when and how he learned facts supporting his FTCA claim.

Both lower courts also concluded that Cloud failed to conduct a diligent inquiry into the basis for his FTCA claim. Assuming *arguendo* the truth of the factual finding, the lack of inquiry is legally irrelevant where, as here, inquiry would not have led to the discovery of facts. A plaintiff's failure to "investigate further" when circumstances would lead a reasonable person to do so is only fatal to its accrual argument if that investigation would have led to actual knowledge. *See Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995) (citing *Jensen v. Snellings*, 841 F.2d 600, 606 (5th Cir. 1988)) (holding that

"[u]nder federal law, the limitations period commences when 'the aggrieved party has either knowledge of the violation or notice of facts which, in the exercise of due diligence, would have led to actual knowledge thereof"). Here, even if Ramming or Cloud had conducted an investigation or had attempted to obtain the *Ramming, et al.*, grand-jury transcripts, their efforts would not have lead to receipt of the information any earlier than June, 1997. Cloud's evidence, District Judge Lynn Hughes' order releasing the grand-jury transcripts to the plaintiff in *Licata v. U.S.*, Civil Action H-97-93, reflects that Cloud's co-defendant Licata filed suit very soon after the acquittal and immediately attempted to obtain the grand-jury transcripts. He did not actually obtain them until June 12, 1997.

This unusual evidence eliminates any need or any latitude for the trial court to guess at what might have happened if Cloud had conducted the investigation that the Court believes was appropriate. We know as a matter of fact and a matter of law that the diligence demanded by the trial court would not have lead to actual knowledge prior to June, 1997. Therefore, Cloud's FTCA claims could not have accrued any earlier than June, 1997, making his March, 1999, administrative claim timely.

D. Public Policy

From a public policy standpoint, the Fifth Circuit's approach to accrual of malicious prosecution is a slippery slope because its adjudges accrual as a matter of law from the context of acquittal. Equating prosecutorial misconduct with malicious prosecution will broaden this narrow cause of action. Further, the district court's approach is equally problematic. Although the Court purports to resolve accrual as a question of fact, the Court ignores all facts but those favoring the Government.

Conclusion

Cloud suffered a protracted federal criminal prosecution that the United States must concede was wrongful. The Fifth Circuit has sent the United States a published message in this case: The more wrongful and devastating the Government's baseless prosecution, the more likely the Government is to avoid punishment. A citizen driven to bankruptcy by the malicious acts of its government representatives needs the full protections intended by Congress in enacting § 108 of the Bankruptcy Code more than anyone else. This Court should review and reverse the decision of the Fifth Circuit Court of Appeals.

Respectfully Submitted,

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Revised January 29, 2002
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20079

LAWRENCE H. RAMMING,
Plaintiff,

versus

UNITED STATES OF AMERICA,
Defendant.

JOHN THOMAS CLOUD,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeals from the United States District Court
for the Southern District of Texas

December 19, 2001

Before SMITH and EMILIO M. GARZA, Circuit Judges, and CUMMINGS, District Judge.[1]

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[1] District Judge of the Northern District of Texas, sitting by designation.

PER CURIAM:

John Thomas Cloud ("Appellant") appeals the district court's dismissal of Appellant's action against the United States ("Appellee") for malicious prosecution and other prosecutorial misconduct as time-barred. We **AFFIRM**.

I. BACKGROUND

In 1994, a federal jury indicted Appellant and several co-defendants on a 27-count indictment for bank fraud, wire fraud, and other offenses. The case was tried in a non-jury proceeding from November 1995 through January 1996. On January 12, 1996, the United States District Court for the Southern District of Texas, Kenneth M. Hoyt, J., granted Appellant's and co-defendants' motion for acquittal and dismissal on the basis of prosecutorial misconduct citing, *inter alia*, the following litany of misconduct in support thereof:

- the government failed in its duty to be forthright in the disclosure of *Brady* materials;
- the government failed to produce . . . questionable materials so that the . . . rights of the defendants could be protected;
- the government intentionally failed or refused to comply with the law;
- the failing of the government, in its duty under the federal Constitution to not violate the Sixth Amendment rights of the defendants to a fair and open trial;

- the government made misrepresentations of facts to the Court. . . . At the very least, this conduct was reckless. At most, it was intended as a fraud on the Court;
- transcripts of the Grand Jury testimony . . . was [sic] wrought with statements that both supported the defendants' theory of the case and foiled that of the government; •the testimony . . . supports the defendants' claim of innocence;
- the government's contentions of equal access, neutral evidence, that the defendants were aware of the information possessed by the Grand Jury, that the testimony was merely impeachment, and that they acted in good faith, is incredible. Only a person blinded by ambition or ignorance of the law and ethics would have proceeded down this dangerous path.
-

United States v. Ramming, 915 F. Supp. 854, 867-68 (S.D. Tex. 1996).

On November 26, 1997, Appellant filed a voluntary Chapter 11 bankruptcy petition, and on September 9, 1999, Appellant's plan of reorganization was confirmed by the bankruptcy court. On March 18, 1999, Appellant presented his administrative claim of malicious prosecution against Appellee and also presented a supplemental claim on November 1, 1999. On October 20, 1999, Appellant's administrative claim was denied.

On December 30, 1999, Appellant filed his prosecutorial misconduct action against Appellee in federal court. The District Court for the Southern District of Texas, Vanessa D. Gilmore, J., dismissed Appellant's claim under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Judge Gilmore held that Appellant's claim was time-barred under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2401(b).

Judge Gilmore's order of December 30, 1999, also rejected Appellant's argument that Appellant was entitled to a two-year extension of the FTCA limitations period as of the date of his November 26, 1997, bankruptcy filing pursuant to 11 U.S.C. § 108(a) of the Bankruptcy Code. In rejecting Appellant's argument, Judge Gilmore held that Appellant was entitled to the sixty-day extension of the limitations period available under 11 U.S.C. § 108(b), but, in any event, the sixty-day period had also expired prior to the time Appellant filed his malicious prosecution suit.

II. STANDARD OF REVIEW

This Court evaluates *de novo* the district court's grant of Appellee's Rules 12(b)(1) and 12(b)(6) motion for dismissal applying the same standard used by the district court. *Hebert v. United States*, 53 F.3d 720, 722 (5th Cir. 1995).

Motions filed under Rule 12(b)(1) of the Federal Rules of Civil Procedure allow a party to challenge the subject matter jurisdiction of the district court to hear a case. Fed. R. Civ. P. 12(b)(1). Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996).

The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. *McDaniel v. United States*, 899 F. Supp. 305, 307 (E.D. Tex. 1995). Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist. *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980).

When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits. *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977) (per curiam). This requirement prevents a court without jurisdiction from prematurely dismissing a case with prejudice. *Id.* The court's dismissal of a plaintiff's case because the plaintiff lacks subject matter jurisdiction is not a determination on the merits and does not prevent the plaintiff from pursuing a claim in a court that does have proper jurisdiction. *Id.*

In examining a Rule 12(b)(1) motion, the district court is empowered to consider matters of fact which may be in dispute. *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981). Ultimately, a motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief. *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998).

Motions to dismiss for failure to state a claim are appropriate when a defendant attacks the complaint because it fails to state a legally cognizable claim. Fed. R. Civ. P. 12(b)(6). The test for determining the sufficiency of a complaint under Rule 12(b)(6) was set out by the United States Supreme Court as follows: "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Conley v. Gibson, 355 U.S. 41, 45-46 (1957). *See also Grisham v. United States*, 103 F.3d 24, 25-26 (5th Cir. 1997).

Subsumed within the rigorous standard of the *Conley* test is the requirement that the plaintiff's complaint be stated with enough clarity to enable a court or an opposing party to determine whether a claim is sufficiently alleged. *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989). Further, "[t]he plaintiff's complaint is to be construed in a light most favorable to the plaintiff, and the allegations contained therein are to be taken as true." *Oppenheimer v. Prudential Sec. Inc.*, 94 F.3d 189, 194 (5th Cir. 1996). This is consistent with the well-established policy that the plaintiff be given every opportunity to state a claim. *Hitt*, 561 F.2d at 608. In other words, a motion to dismiss an action for failure to state a claim "admits the facts alleged in the complaint, but challenges plaintiff's rights to relief based upon those facts." *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1137 (5th Cir. 1992). Finally, when considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the district court must examine the complaint to determine whether the allegations provide relief on any possible theory. *Cinel v. Connick*, 15 F.3d 1338, 1341 (5th Cir. 1994).

III. DISCUSSION

- **Accrual of Appellant's Malicious Prosecution Cause of Action**

The FTCA mandates that

> [a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing . . . of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b) (1994). Although phrased in the disjunctive, "this statute requires a claimant to file an administrative claim within two years [of accrual] *and* file suit within six months of its denial." *Houston v. United States Postal Serv.*, 823 F.2d 896, 902 (5th Cir. 1987) (emphasis in original). *See also Willis v. United States*, 719 F.2d 608, 612 (2d Cir. 1983); *Schuler v. United States*, 628 F.2d 199, 201 (D.C. Cir. 1980).

Here, the threshold issue is determining when Appellant's claim accrued. Appellant contends that his claim did not accrue at the time of his acquittal in January 1996 but only accrued in December 1998 when one of his acquitted co-defendants discovered the contents of the grand jury transcripts which had led to Appellant's and his co-defendants' original indictment. Appellee contends, however, that Appellant's claim accrued, and the limitations period began to run, when Appellant was acquitted.

Before a malicious prosecution claim can accrue, the underlying criminal proceeding must terminate in the plaintiff's favor. *Heck v. Humphrey*, 512 U.S. 477, 489 (1994). Based on the repeated instances of prosecutorial misconduct enumerated by Judge Hoyt, Appellant and his co-defendants were acquitted of all charges on January 12, 1996. Thus, the proceeding was terminated in Appellant's favor.

A cause of action under federal law accrues within the meaning of § 2401(b) "when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Brown v. Nationsbank Corp.*, 188 F.3d 579, 589-90 (5th Cir. 1999) (internal quotes and citations omitted), *cert. denied*, 530 U.S. 1274 (2000). In FTCA cases,

> [a] plaintiff . . . armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government.

United States v. Kubrick, 444 U.S. 111, 123 (1979).

Ascertaining Appellant's awareness of the existence of a possible cause of action has two elements: "(1) [t]he existence of the injury; and (2) causation, that is, the connection between the injury and the defendant's actions." *Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995). As to causation, Appellant

> need not have knowledge of fault in the legal sense for the statute to begin to run, but [Appellant] must have knowledge of facts that would lead a reasonable person (a) to conclude that there was a causal connection . . . or (b) to seek professional advice, and then, with that advice, to conclude that there was a causal connection between [Appellee's acts] and [Appellant's] injury.

Id. (internal quotes and citations omitted).

Certainly, Judge Hoyt's unequivocal iteration of examples of prosecutorial misconduct leaves little doubt that, at the time of Appellant's acquittal, Appellant had ample evidence of essential facts which would support the possible existence of a claim for malicious prosecution. At the very least, Appellant was in a position "to seek professional advice" from a lawyer or other expert, and "then, with that advice, to conclude that there was a causal

connection between [Appellee's acts] and [Appellant's] injury." *Id. See also Brown v. United States*, 653 F.2d 196, 199 (5th Cir. 1981) (holding that, in a malicious prosecution action under Texas law, malice may be inferred from the lack of probable cause or the conclusion that the government acted in reckless disregard of an individual's rights). Further, the "requirement of diligent inquiry imposes an affirmative duty on the potential plaintiff to proceed with a reasonable investigation in response to an adverse event." *Pacheco v. Rice*, 966 F.2d 904, 907 (5th Cir. 1992).

The difficulty here is that Appellant did not conduct an inquiry, diligent or otherwise, even though Appellant knew or had reason to know of the injury forming the basis of a possible malicious prosecution claim as of January 12, 1996. We are not free to construe § 2401(b) so as to defeat its obvious purpose of encouraging the prompt presentation of claims, *Kubrick*, 444 U.S. at 118, and we discern no sound reason for visiting the consequences of Appellant's investigative omission upon Appellee by delaying the accrual of Appellant's claim. *Id.* at 124. Therefore, because Appellant knew or should have known of his injury and the causal connection between his injury and Appellee's conduct as of the date of Appellant's acquittal, this Court finds that Judge Gilmore did not err in holding that Appellant's claim for malicious prosecution accrued on January 12, 1996.

- **Tolling of Limitations Period**

Having determined that the accrual date of Appellant's claim was January 12, 1996, we now turn to Appellant's argument that the FTCA limitations period was tolled for two years as of the filing of his Chapter 11 bankruptcy petition on November 26, 1997. Appellant bases his contention on § 108(a) of the Bankruptcy Code which provides:

> (a) If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of-
>
> > (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
> >
> > (2) two years after the order for relief.

11 U.S.C. § 108(a) (1993).

Appellant argues that his March 18, 1999, FTCA claim presentment was timely because § 108(a) extends the limitations period to "commence an action" for two years after the order for relief, *i.e.*, November 26, 1997, to November 26, 1999. Alternatively, Appellant argues that tolling is appropriate because the bankruptcy court ordered on September 9, 1999, that "all limitations periods for any other claims under applicable law are tolled and extended until this case is closed or a final decree is entered."

Appellee argues, however, that presentment of an administrative claim does not constitute an "action" within the meaning of § 108(a) and, therefore, Appellant's limitations period is controlled by the sixty-day extension contained in § 108(b). Section 108(b) provides:

> (b) Except as provided in subsection (a) of this section, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1201 or 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of-
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> (2) 60 days after the order for relief.

11 U.S.C. § 108(b) (1993). Appellee contends that Appellant's March 1999 administrative claim qualifies as "any pleading, demand, notice or proof of claim or loss, . . . or [] any other similar act" as required by § 108(b). Thus, Appellee argues that under § 108(b) Appellant had until on or about January 26, 1998, sixty days after his Chapter 11 filing, to present his administrative claim.

The resolution of this issue is controlled by this Court's binding precedent set forth in *TLI, Inc. v. United States*, 100 F.3d 424 (5th Cir. 1996). In *TLI*, this Court held that the filing of an administrative claim does not constitute the commencement of an "action" under § 108(a). *Id.* at 427 (citing *In re Carter*, 125 Bankr. 832, 836 (D. Kan. 1991); *In re Howard Indus., Inc.*, 170 Bankr. 358, 361-62 (S.D. Ohio 1994)). The term "commencement of an action" in § 108(a) applies only to "the bringing of suit in court" and not to

administrative proceedings that may precede such a suit. *Id.* This Court reasoned that "an action in its usual legal sense means a lawsuit brought in a court; a formal complaint brought within the jurisdiction of a court of law." *Id.* (quoting Black's Law Dictionary 28 (6th ed. 1990)). *See also* Fed. R. Civ. P. 3 (defining "Commencement of Action" as follows: "A civil action is commenced by filing a complaint with the court").

Although Appellant's March 1999 administrative "claim" was an essential legal prerequisite to his malicious prosecution action filed in federal court, Appellant's "action" was not commenced until December 30, 1999, when Appellant filed suit in federal court. At that time, not only had the two-year FTCA claim presentment limitations period expired, *i.e.*, January 12, 1996, to January 12, 1998; but, even if § 108(a) applied as argued by Appellant, the two-year "commencement of the case" limitations period after the order for relief under § 108(a) had also expired, *i.e.*, November 26, 1997, to November 26, 1999.

Appellant suffers a similar fate under application of § 108(b), which allows only a sixty-day extension after the order for relief. Under § 108(b), Appellant was required to present his FTCA administrative claim sixty days after November 26, 1997, *i.e.*, by January 25, 1998. Consequently, Appellant's March 18, 1999, presentment of claim was also time-barred.

Similarly inconsequential is Appellant's argument urging us to give effect to the bankruptcy court's September 9, 1999, order tolling "all limitations periods for all other claims under applicable law" until the bankruptcy case was closed or a final decree was entered. We agree with Appellee that the bankruptcy court had no jurisdiction on September 9, 1999, to order the tolling of a limitations period which had expired approximately twenty months earlier, *i.e.*, January 13, 1998.

Limitations periods in statutes waiving sovereign immunity are jurisdictional, and a court exercising its equitable authority may not expand its jurisdiction beyond the limits established by Congress. *Houston*, 823 F.2d at 898, 902. The FTCA also acts to waive the immunity of the United States; and this Court, in construing the statute of limitations which is a condition of that waiver, "should not take it upon [itself] to extend the waiver beyond that which Congress intended." *Kubrick*, 444 U.S. at 118. We find that the bankruptcy court's order of September 9, 1999, did not resurrect its jurisdiction and that said order is of no force or effect in tolling any limitations periods applicable to this matter.

IV. CONCLUSION

For the reasons set forth above, the lower court's dismissal of Appellant's action for malicious prosecution and other prosecutorial misconduct as time-barred under the FTCA is **AFFIRMED**.

United States District Court,
S.D. Texas, Houston Division.

John Thomas CLOUD,
Plaintiff,

v.

UNITED STATES of America,
Defendant.

No. CIV. A. H-99-4359.

[Entered: Dec. 22, 2000]

Richard R Stone, Sr, U S Dept of Justice, Washington, DC, for United States of America, defendants.

ORDER

GILMORE, District Judge.

Pending before the Court is Defendant United States of America's motion to dismiss Plaintiff John Thomas Cloud's complaint under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). (Instrument No. 34). Having considered the submissions of the parties and the applicable law, the Court finds that the motion should be GRANTED.

I.

Plaintiff John Thomas Cloud ("Cloud") brings this action under the Federal Torts Claims Act ("FTCA") against Defendant United States of America ("United States") alleging malicious prosecution, wrongful interference, continued harassment, and damages arising out of a grand jury indictment of Cloud, his subsequent trial, and ultimate acquittal.

In 1994, pursuant to an investigation by the United States, a grand jury indicted Cloud and several co-defendants in a 27-count indictment for conspiracy to defraud banks, bank fraud, wire fraud, bank larceny, bank bribery, misapplication of bank funds, false entries in bank records, and money laundering. A trial was conducted from November 1995 through January 1996. In January 1996, the defendants moved for dismissal of the indictment and acquittal pursuant to Federal Rule of Criminal Procedure 29 on the basis of prosecutorial misconduct. Judge Kenneth M. Hoyt of the United States District Court for the Southern District of Texas granted the motions to dismiss and acquit and found that, *inter alia,* the United States engaged in prosecutorial misconduct by failing to disclose *Brady* materials, and that the Federal Bureau of Investigation agent's testimony was inconsistent with his grand jury testimony. *United States v. Ramming,* 915 F.Supp. 854, 868 (S.D.Tex. 1996).

Paul Licata ("Licata") and Lawrence Ramming ("Ramming") were two of Cloud's co-defendants. Licata filed suit for malicious prosecution in the Southern District of Texas on January 13, 1997. *Licata v. United States, Civ.* A. No. H-97-0093. Similarly, Ramming filed suit for malicious prosecution in the Southern District of Texas on December 14, 1999. *Ramming v. United States,* Civ. A. No. 99-4359. In the *Licata* litigation, Judge Lynn N. Hughes ordered the United States to release the transcripts of the grand jury proceedings that led to the original indictment in 1994. In December 1998, Licata offered the transcripts into the record to bolster his claim of malicious prosecution. Judge Hughes held a bench trial from December 8, 1998, through December 10, 1998. Before a judgment was entered, however, the parties settled.

Cloud presented his administrative claim of malicious prosecution to the United States Department of Justice ("DOJ") on March 18, 1999, and presented a

supplemental claim on November 1, 1999. (Instrument No. 37, at 2). Cloud had earlier filed a voluntary bankruptcy petition on November 26, 1997. (Instrument No. 37, at 2). On October 20, 1999, the DOI denied Cloud's administrative claim. Subsequently, on December 30, 1999, Cloud h1ed his action against the United States in the Southern District of Texas before Judge David Hittner. On April 11, 2000, Ramming and Cloud's suits were consolidated in this Court under Civil Action Number 99-4359. (Instniment No. 12). Accordingly, Cloud's second amended original complaint was re-docketed in this Court on May 19, 2000. (Instrument No. 37). In his second amended complaint, Cloud contends that he did not discover the facts underlying his cause of action for malicious prosecution until December 1998. In any event, Cloud maintains, the two-year FTCA statute of limitations was tolled for two years upon the filing of his voluntary bankruptcy petition. (Id. at 2).

On March 21, 2000, prior to the consolidation of Ramming and Cloud's suits, the United States filed a motion to dismiss Ramming's complaint for lack of jurisdiction and for failure to state a claim, arguing that Ramming failed to timely file his suit within the FTCA's two-year statute of limitations. On the same day, the United States filed a similar motion to dismiss Cloud's complaint before Judge Hiltner. In an Order dated July 26, 2000, the Court granted the United States' motion to dismiss Ramming's complaint. (Instrument No. 431)

On May 19, 2000, following the consolidation of Ramming and Cloud's suits, the United States' motion to dismiss Cloud's complaint and memorandum of law were re-docketed in this Court. (Instrument Nos. 34 and 35). In its motion, which it alternatively termed a motion for summary judgment, the United States argues that Cloud's claim was time-barred under the FTCA because it was not presented to the DOJ within two years of its accrual. It maintains that Cloud knew or had reason to know of the

injury forming the basis of his malicious prosecution claim when Judge Hoyt issued his opinion acquitting Cloud on January 12, 1996. Under this rationale, the United States argues that Cloud had until approximately January 13, 1998, to file his administrative claim. With respect to Cloud's assertion that he is protected by a two-year tolling period because he filed a bankruptcy petition in November 1997, the United States contends that, under section 108) of the Bankruptcy Code, the bankruptcy filing only tolled the FTCA statute of limitations for sixty days. Because the bankruptcy filing would only toll the FTCA statute of limitations until approximately January 26, 1998, according to the United States, Cloud's March 1999 administrative claim presentment was time-barred.

Cloud filed his response to the United States' motion on April 10, 2000. The response was re-docketed in this Court on May 19, 2000. (Instrument No. 38). In his response, Cloud initially argues that the United States may only seek a "partial dismissal" because I I U.S.C.A. § 106(c) (2000) provides for the abrogation of sovereign immunity independent of the FTCA's limited waiver of sovereign immunity. The crux of Cloud's argument, however, is that the FTCA statute of limitations did not begin accruing on January 12, 1996, because he did not know "what the [United States] had said and done behind the closed doors of the Grand Jury" until he obtained the grand jury proceedings transcripts in December 1998. Alternatively, even assuming the limitations period began to run on January 12, 1996, Cloud maintains that 11 U.S.C.A. § 108(a) tolled the limitations for two years upon the filing of his voluntary bankruptcy petition. According to Cloud, the two-year tolling protection applies because the presentment of an administrative claim to me DOJ qualifies as a "commence[ment of] an action" as required by section 108(a). Finally, Cloud maintains that, in any event the FTCA limitations period was tolled because in September 1999 the United States Bankruptcy Court for the Western District of

Texas ("bankruptcy court") ordered "1017 all limitations periods for all other claims under applicable law [ ] tolled and extended until [Cloud's bankruptcy] case is closed or a final decree is entered." (Instrument No. 38, Ex. 5 at 3).

The United States' reply was filed on April 27, 2000.[1] (Instrument No. 17). Initially, it asserts that its motion is not a "partial dismissal" because, in any event, Cloud has failed to abide by the FTCA's statute of limitations. The United States also reiterates that the FTCA statute of limitations began accruing on January 12, 1996, because Cloud was aware of enough facts to support a claim of malicious prosecution. In addition, the United States argues that the case law does not consider an administrative claim an "action" within the meaning of 11 U.S.C.A. § 108(a) so as to warrant the application of a two-year tolling period. Lastly, the United States contends that the bankruptcy court's order tolling "all limitations periods for all other claims under applicable law," (Instrument No. 38, Ex. 5, at 3), lacked jurisdiction because the FTCA's limitations period is only a limited waiver of sovereign immunity.

On August 31, 2000, as a consequence of this Court's Order dismissing Ramming's complaint, (Instrument No. 43), Cloud filed a supplemental response to the United States' motion to dismiss. (Instrument No. 45). Cloud argues that, even if he had conducted an investigation and sought the grand jury transcripts, his "efforts would not have lead *(sic)* to receipt of the grand jury transcripts before June, 1997." *(Id.* at 3). That is, because former co-defendant Licata's efforts did not result in the release of the transcripts until June 1997, Cloud could not be expected, as a matter of law, to obtain them any earlier. Because June 1997 was the earliest date he could have received the transcripts, the two-year limitations period would expire in June 1999.

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[1] The United States' reply, unlike its motion to dismiss and Cloud's subsequent response, was not re-docketed because it was filed originally in this Court.

Consequently, according to Cloud, his March 1999 administrative claim presentment fell within this statutory time period.

II.

A.

"A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *See Home Builders Assn of Miss., Inc. v. City of Madison,* 143 F3d 1006, 1010 (5th Cir. 1998). A district court may dismiss an action for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) on any one of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the Court's resolution of disputed facts. *Barrera-Montenegro v. United States,* 74 F.3d 657, 659 (5th Cir. 1996); *Voluntary Purchasing Groups, Inc. v. Reilly,* 889 F.2d 1380, 1384 (5th Cir. 1989). In examining a Rule 12(b)(1) motion, the Court is empowered to consider matters of fact which are in dispute. *See Williamson v. Tucker,* 645 F.2d 404, 413 (5th Cir. 1981). The party asserting jurisdiction bears the burden of establishing it when the Court's subject matter jurisdiction is challenged. *See Boudreau v. United States,* 53 F.3d 819 82 (5th Cir. 1995). However, any uncontroverted facts in the complaint must be accepted as true. *Gaubert v. United States,* 885 F.2d 1284, 1285 (5th Cir. 1989), *rev'd on other grounds,* 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed 335 (1991). Moreover, the Court must construe the complaint broadly and liberally. Id.

When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the Court should usually consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits. *Hitt v. Pasadena, 561* F.2d 606, 608 (5th Cir. 1977); **1018Kunihiko Iwata v. Stryker Corp.,* 59 F.Supp.2d 600, 602 (N.D. Tex. 1999). This

requirement prevents a court without jurisdiction from prematurely dismissing a case with prejudice. Id. The Court's dismissal of a plaintiffs case because the Court lacks subject matter jurisdiction is not an adjudication of the merits and does not prevent the plaintiff from pursuing a claim in a court that does have proper jurisdiction. Id.

A motion to dismiss challenging the Court's subject matter jurisdiction under Rule 12(b)(1) should only be granted "if it appears that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief." *Home Builders Assn,* 143 F.3d at 1010 (citing *Benton v. United States,* 960 F.2d 19, 21 (5th Cir. 1992)); *Santerre v. Agip Petroleum Co.,* 45 F. Supp.2d 558, 565 (S.D. Tex. 1999).

B.

Rule 12(b)(6) allows for dismissal if a plaintiff fails "to state a claim upon which relief may be granted." Such dismissals, however, are rare, *Clark v. Amoco Production Co.,* 794 F.2d 967, 970 (5th Cir. 1986), and only granted where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief " *Conley v. Gibson,* 355 U.S. 41, 45-6, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). Dismissal can be based either on a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dept.,* 901 F.2d 696, 699 (9th Cir. 1988); *Vines v. City of Dallas, Texas,* 851 F.Supp. 254, 259 (N.D. Tex. 1994), *aff'd,* 52 F.3d. 1067 (5th Cir. 1995).

In determining whether a dismissal is warranted pursuant to Rule 12(b)(6) the Court accepts as true all allegations contained in the plaintiff s complaint. *Gargiul v. Tompkins,* 704 F.2d 661, 663 (2d Cir. 1983), *vacated on other grounds,* 465 U.S. 1016, 104 S.Ct. 1263, 79 L.Ed.2d 670 (1984); *Kaiser Aluminum & Chem. Sales, Inc.v. Avondale Shipyards, Inc.,* 677 F.2d 1045, 1050 (5th Cir.1982), *cert. denied,* 459 U.S. 1105, 103 S.Ct. 729, 74 L.Ed.2d 953 (1983). In addition, all

reasonable inferences are to be drawn in favor of the plaintiffs claims. Id. "To qualify for dismissal under Rule 12(b)(6), a complaint must on its face show a bar to relief." *Clark,* 794 F.2d at 970.

III.
A.

The United States argues that Cloud's complaint should be dismissed because he failed to present an administrative claim with the appropriate federal agency prior to the expiration of the statute of limitations in the FTCA. The FTCA provides a limited waiver of the United States' sovereign immunity from suit. The FTCA is also a grant of jurisdiction to federal court in those cases where the United States has waived immunity and has consented to be sued. Cloud filed this action for malicious prosecution and damages pursuant to the law enforcement exception to sovereign immunity in 28 U.S.C.A. § 2671 (2000).

A prerequisite to the commencement of an action against the United States in federal court is the presentment of an administrative claim. *Brown v. Nationsbank Corp.,* 188 F.3d 579, 589-90 (5th Cir. 1999), *cert. denied,* -- U.S. --, 120 S.Ct. 27409 147 L.Ed.2d 1004 (2000). The FTCA provides that a plaintiff must present an administrative claim to the appropriate federal agency within two years of the claim's accrual:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C.A. § 2401(b) (2000).

Here, the crux of the dispute is ascertaining when Cloud's cause of action accrued. Cloud and several other co-defendants were acquitted on January 12, 1996. *United States v. Ramming*, 915 F.Supp. 854 (S.D. Tex. 1996). His administrative claim was presented to the DOJ on March 18, 1999. (Instrument No. 37, at 2). On October 20, 1999, the DOJ denied Cloud's claim. (Id.). Cloud maintains that his claims accrued, and the limitations period began, only when he learned of the contents of grand jury transcripts released during former co-defendant Licata's trial in December 1998.[2] (Instrument No. 38, at 9). In contrast, the United States contends that the claims accrued, and the limitations period began, when Cloud was acquitted in January 1996. (Instrument No. 35, at 4).

A cause of action under federal law accrues within the meaning of section 2401(b) " 'when the plaintiff knows or has reason to know of the injury which is the basis of the action.'" *Brown*, 188 F.3d at 589-90 (quoting *Moore v. McDonald*, 30 F.3d 616, 620-21 (5th Cir. 1994)). In *Brown*, the Fifth Circuit ruled that the plaintiff's knowledge of his injury depends upon two elements: "(1) the existence of the injury; and (2) the connection between the injury and the defendant's actions." 188 F.3d at 590 (citing *Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir.1995)). "Moreover, a plaintiff need not have actual knowledge" of the injury "if the circumstances would lead a reasonable person to investigate further." *Piotrowski*, 51 F.3d at 516 (citations omitted).

Before a malicious prosecution claim can accrue, an underlying criminal proceeding must terminate in the plaintiffs favor. *See Heck v. Humphrey*, 512 U5. 477, 114 S.Ct.

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[2] Although not determinative, it is worth noting that Cloud's attorney on November 9, 1999, mailed a letter to a DOJ representative stating, among other things, that Cloud's claim "accrued when the underlying criminal case against Mr. Cloud was finally disposed [on January 12, 1996]." (Instrument No. 35, Ex. 1, at 1).

2364, 2374, 129 L.Ed.2d 383 (1994); *see also* Tex. Civ. Prac. & Rem. Code § 16.002(a) (Vernon 1999) ("For purposes of malicious prosecution actions, prosecution ends, and cause of action accrues, when formal criminal proceedings are terminated"). Judge Hoyt's opinion granting acquittal was issued on January 12, 1996, thereby terminating the proceeding in Cloud's favor. *See Ramming*, 915 F.Supp. at 857.

Cloud's injury originates from the same set of facts underlying the malicious prosecution lawsuit initiated by Byaner co-defendant Ramming. In an Order dated July 26, 2000, (Instrument No. 43), this Court ruled that Ramming's suit was time-barred. Like Cloud, Ramming was acquitted on January 12, 1996. Ramming presented his administrative claim to the DOJ on February 5, 1999, and it was denied, along with Cloud's claim, on October 20, 1999. Cloud maintains, in fact, that "his cause of action for malicious prosecution, like the similar claim of Ramming, did not accrue prior to December, 1998." (Instrument No. 30, at 2).

For purposes of determining whether the statute of limitations period expired, there is no evidence that Cloud was in a position at all dissimilar to Ramming.

In the Order dismissing Ramming's claim (Instrument No. 43), this Court determined that Ramming knew of his injury when he was indicted and tried. As to the second prong of the accrual test, Ramming argued that he was not put on notice of the connection between his injury and the United States' actions until he obtained access to the grand jury transcripts in December 1998. Only when he read the transcripts, Ramming asserted, could he have known of the United States' allegedly wrongful actions. The United States contended that Ramming should have teamed of the connection between his injury and the United States' actions upon his acquittal on January 12, 1996. According to the United States, Ramming's claim

would have been timely presented had he diligently investigated and sought legal advice as former co-defendant Licata did in asking for the grand jury transcripts. Ultimately, this Court found the United States' reasoning persuasive and ruled that Ramming should have known of the connection at the time of his acquittal. Even were the Court to disregard the United States' actions at trial for purposes of determining when Ramming was put on notice, as Ramming urged, Judge Hoyt's opinion on January 12, 1996, discussed the fact that the United States' behavior at the grand jury proceeding was suspect:

> [A] comparison of the 302 statements of witnesses to the same witnesses' Grand Jury testimony is revealing. The FBI agent took extensive liberties, choosing conclusory words that caused that statements to fit within the government's theory of the case. Assuming that this conduct was merely overzealousness, the error was exposed during the Grand Jury testimony of the same witnesses. Without a doubt, this disparity came to the United States Attorney's attention because, the tone and tenor of the questioning of the witnesses before the Grand Jury is also revealing, to say the least. *Ramming*, 915 F.Supp. at 868.

Furthermore, this Court held that, even if Ramming did not know for a fact that the United States had engaged in misconduct, he apparently made no effort to ascertain the truth as to what did occur at the grand jury proceedings. The Court noted that on certain occasions plaintiffs have successfully petitioned Texas courts for release of grand jury transcripts in cases where, "in the judgment of the court, it became material to the administration of justice that disclosure be allowed." *Stern v. State ex rel. Ansel*, 869 S.W.2d 614 (Tex.App.-Houston [14th Dist.] 1994, writ

denied). Because Ramming was put on notice upon his acquittal in January 1996, his claims became time-barred after January 13, 1998. *See* 28 U.S.C.A. § 2401(b) (2000).

Here, like Ramming, Cloud knew he was injured when he was indicted and tried. Under the *Brown* accrual framework, the question then arises whether Cloud was put on notice of "the connection between the injury and the defendant's actions." 188 F.3d at 590 (holding that the plaintiff s knowledge of his injury depends upon two elements: "(I) the existence of the injury; and (2) the connection between the injury and the defendant's actions").

Cloud argues that "his cause of action for malicious prosecution, like the similar claim of Ramming, did not accrue prior to December, 1998." (Instrument No. 30, at 2). Although he acknowledges that he "possessed some facts in support of a claim for malicious prosecution," (Instrument No. 38, at 9), on January 12, 1996, he "did not and could not know what the Government has said and done behind the closed doors of the Grand Jury" until the grand jury transcripts were released at Licata's December 1998 trial. *(Id.)*. The United States argues that Cloud should have known of the connection between his injury and the United States' actions upon his acquittal on January 12, 1996. According to the United States, Cloud had two years to investigate and present an administrative claim, yet failed to do so.

A claim under the FTCA accrues when the plaintiff learns of the connection between his injury and the defendant's actions, not when the plaintiff learns of the legal or proximate cause of his injury. *See United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352, 360, 62 L.Ed.2d 259 (1979) (holding that accrual of a cause of action does not await plaintiff's awareness that the injury was negligently inflicted, but, rather, plaintiff armed with facts is not

excused from failure to seek advice as to whether his legal rights have been invaded). Although he knew of his injury by January 1996, Cloud maintains that he did not know of the connection between his injury and the United States' actions until the contents of the grand jury transcripts were revealed in December 1998. This position, however, conflicts with Cloud's argument that he "possessed some facts in support of a claim for malicious prosecution" in January 1996. (Instrument No. 38, at 9). If, as Cloud contends, he was aware of facts to support a malicious prosecution claim in January 1996, then he most certainly knew of the connection between his injury and the United States' actions. Cloud's position is further belied by his assertion that he "was not aware of the facts underlying a *viable* claim for malicious prosecution until December, 1998." (Instrument No. 38, at 13) (emphasis added). A plaintiff need not realize that a legal cause of action exists; a plaintiff need only be aware of the facts that would support a claim. *Piotrowski, 51* F.3d at 516 (citing *Harrison v. United States,* 708 F.2d 1023, 1027 (5th Cir. 1983)). Cloud's statement that he "possessed some facts in support of a claim for malicious prosecution," (Instrument No. 38, at 9), demonstrates that the FTCA statute of limitations began accruing in January 1996.

Even if Cloud did not know for a certainty of the connection between his injury and the United States' actions, he did not make any effort to ascertain the truth as to what happened at the grand jury proceedings. *See Piotrowski,* 51 F.3d at 516 (holding that a plaintiff need not have actual knowledge of his injury "if the circumstances would lead a reasonable person to investigate further"). After witnessing the United States' actions at trial, and subsequently learning of the United States' actions in the grand jury proceedings through Judge Hoyt's opinion, Cloud has not alleged any facts indicating that he tried to obtain the grand jury transcripts. In fact, Cloud justifies his failure to investigate further by arguing that his "efforts

would not have lead *(sic)* to receipt of the grand jury transcripts before June, 1997." (Instrument No. 45, at 3). Cloud pins this justification on his belief that, because former co-defendant Licata did not obtain the release of the grand jury transcripts until June 1997, Cloud's investigation would have resulted in the same outcome. Consequently, Cloud argues that the statute of limitations began to accrue in June 1997, not January 1996, thereby placing his administrative claim to the DOJ within the FTCA statute of limitations.

Although the principles of equitable tolling apply to the statute of limitations under the FTCA, *Perez v. United States,* 167 F.3d 913, 917 (5th Cir. 1999), Cloud's circumstances do not justify its use.[3] *See id* at 919 (holding that equitable tolling "is not [a doctrine] that trial courts have discretion to use whenever they please ... [because] [s]tatutes of limitations serve a vital role in blocking stale claims"). In *Irwin v. Department Of Veterans Affairs,* 498 U.S. 89, 111 S.Ct. 453, 458, 112 L.Ed.2d 435 (1990), the Supreme Court held that equitable tolling is permissible "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights." Here, Cloud acknowledges that he did not investigate what happened in the grand jury proceedings. (Instrument No. 45, at 3).

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[3] Equitable tolling principles may not apply in Cloud's case, in any event. In his second amended original complaint, Cloud did not allege equitable tolling of the FTCA statute of limitations. See *Richard v. Ross,* No. Civ.A. 98-1676, 1998 WL 915865, at *4 (E.D.La. Jan.4, 1998) (holding that if the equitable tolling theory applies [in the context of a civil rights lawsuit], it should be alleged in the complaint"). His only assertion of tolling relates to the tolling provisions in 11 U.S.C.A. § 108 (2000). (Instrument No. 37, at 2). The Court will independently address Cloud's section 108 tolling arguments. *See infra* Part B.

Further, there is no allegation that the United States "induced or tricked" Cloud into allowing the statute of limitations to pass.

Equitable tolling should nevertheless apply, according to Cloud. He cites *Piotrowski, 51* F.3d 512 (5th Cir. 1995), as support for his argument. In *Piotrowski, the* victim of a murder attempt brought suit against the City of Houston Police Department in 1993 claiming that it prevented an informant from warning her about the pending murder attempt in 1980. Although it affirmed the dismissal of the victim's claim as time-barred, the Fifth Circuit held that the limitations period did not begin accruing in 1980 because "[w]hen a defendant controls the facts surrounding causation such that a reasonable person could not obtain the information even with a diligent investigation, a cause of action accrues, but the statute of limitations is tolled." *Id.* at 517. Unlike *Piotrowski,* however, there is no indication that the United States "took active steps to suppress any information," Id., given that Cloud and his former co-defendants knew the grand jury proceedings occurred. Moreover, whereas the *Piotrowski* plaintiff claimed that she was completely unaware for 13 years that me police had any knowledge of the murder attempt, Id. at 514, Cloud knew that he had a claim of malicious prosecution in January 1996. (Instrument No. 38, at 9) (stating that "Cloud and the other co-defendants possessed some facts in support of a claim for malicious prosecution").

In this regard, Cloud alternatively argues that tolling is appropriate because the bankruptcy court ordered on September 9, 1999, that "all limitations periods for any other claims under applicable law are tolled and extended until this case is closed or a final decree is entered." (Instrument No. 38, Ex. 5, at 3). The bankruptcy court's order is not binding, however, because the FTCA's two-year statute of limitations had already expired on approximately January

13, 1998. Even tolling the FTCA statute of limitations period pursuant to 11 U.S.C.A. § 108 (2000), as Cloud urges, still renders the bankruptcy court's order untimely. That is, because the Court finds under section 108(b) that Cloud's FTCA limitations period could only be tolled for a maximum of 60 days, *see infra* Part B, Cloud had, at most, until approximately January 26, 1998 to file his claim with the DOJ. Because the Court finds that the FTCA limitations period already lapsed on the date of the bankruptcy court's order, it need not address whether the bankruptcy court's order that "all limitations periods for any other claims under applicable law are tolled and extended until this case is closed or a final decree is entered" is binding upon this Court.[4] (Instrument No. 38, Ex. 5, at 3).

The Court is not unsympathetic to Cloud!s allegations. However, the FTCA only constitutes a limited waiver of the United States' sovereign immunity. The limitations provisions are "the balance struck by Congress in the context of tort claims against the Government; and [the Court is] not free to construe it so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims." *Kubrick,* 100 S.Ct. at 357.

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[4] The Court notes, without deciding, that there is a question whether the bankruptcy court possessed the authority to "toll[ ] and extend [ ]" the statutes of limitations for "any other claims under applicable law." (Instrument No. 38, Ex. 5, at 3). Although the bankruptcy courts "may issue any order, process, Or judgment that is necessary or appropriate to carry out the provisions," 11 U.S.C.A. § 105(a) (2000), of the Bankruptcy Code, the Supreme Court has held that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers,* 485 U.S. 197, 108 S.Ct. 963, 99 L.Ed.2d 169 (1988). Here, it is not clear that the bankruptcy court's blanket order that all statutes of limitations are tolled for "*any* other claims under applicable law," (Instrument No. 38, Ex. 5, at 3) (emphasis added), was exercised within the confines of the Bankruptcy Code.

B.

Cloud contends that, even if the Court determines that his FTCA claim began accruing on January 12, 1996, the statute of limitations was tolled when he subsequently filed for bankruptcy on November 26, 1997. (Instrument No. 37, at 2). Cloud argues that under 11 U.S.C.A. § 108(a) (2000) his FTCA claim did not expire until November 1999. (Instrument No. 38, at 13). Section 108(a) of the Bankruptcy Code provides, in relevant part:

> (a) If applicable nonbankruptcy law ... fixes a period within which the debtor may *commence an action, and* such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of—
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> (2) two years after the order for relief.

11 U.S.C.A. § 108(a) (2000) (emphasis added).

According to Cloud, section 108(a) is the appropriate Bankruptcy Code provision for tolling his FTCA claim because "commence an action," *Id.*, is not limited to filing an action in court. Indeed, Cloud maintains that "[t]he legislative history of § 108 reveals that subsection (a) encompasses tolling for acts beyond the simple filing of a lawsuit." (Instrument No. 38, at 17). Consequently, Cloud urges the Court to rule that section 108(a)'s "commence an action" language contemplates the presentment of an administrative claim.

The United States, in contrast, argues that Cloud seeks tolling protection under the wrong Bankruptcy Code provision. Rather, the United States contends that Cloud's claim was only tolled for 60 days under 11 U.S.C.A. § 108(b) (2000). In pertinent part, section 108(b) reads:

> (b) [I]f applicable nonbankruptcy law ... fixes a period within which the debtor or an individual ... may file *any pleading, demand, notice, or proof of claim or loss, ... or perform any other similar act,* and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of—
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> (2) 60 days after the order for relief.

11 U.S.C.A. § 108(b) (2000) (emphasis added).

The United States maintains that section 108(b), and not section 108(a), is the applicable tolling provision because Cloud's administrative claim to the DOJ qualifies as "any pleading, demand, notice, or proof of claim or loss, ... or [ ] any other similar act." *Id.* The United States argues that Cloud's presentment of an administrative claim does not mean that he has "commence[d] an action" under section 108(a). In contrast, Cloud contends that section 108(b) is merely a residual provision generally reserved for claims "outside the context of litigation." (Instrument No. 38, at 17). He asserts that "[ilt does not make sense to give a trustee a two-year extension to file suit under the Federal Tort Claims Act [under section 108(a)] but a sixty- day extension to file an administrative claim [under section 108(b)].11 *(Id.* at 18).

The challenge over which Bankruptcy Code tolling provision applies is crucial because it determines whether Cloud's FTCA claim is tolled for two years or merely sixty days. There is no question that one of these provisions apply because Cloud's bankruptcy petition of November 26, 1997, qualifies as an "order for relief' under the Bankruptcy Code. 11 U.S.C.A. § 301 (2000) (stating that "[t]he commencement of a voluntary case under [the Bankruptcy Code] constitutes an order for relief'). If section 108(a) applies, thus tolling the FTCA claim for two years, Cloud would have been allowed to present his administrative claim to the DOJ until November 1999. On the other hand, applying section 108(b) would have only allowed Cloud to present his administrative claim to the DOJ until January 1998, thereby time-barring his FTCA claim.

The FTCA's intersection with the tolling provisions in sections 108(a) and (b) is an issue of first impression in the Fifth Circuit. However, the District of Columbia Circuit's reasoning in *Eagle-Picher Indus., Inc. v. United States, 937* F.2d 625 (D.C. Cir. 1991), is persuasive. In *Eagle-Picher;* an asbestos products manufacturer to shipyards sued the United States to recover substantial expenses incurred ftom asbestos-related litigation and settlements. Because the plaintiff presented its administrative claims to the relevant federal agencies on February 15, 1984, only claims after February 15, 1982, could be included in its FTCA suit. However, more than 90% of the plaintiffs underlying claims occurred before February 15, 1982. Consequently, the plaintiff argued that its filing of a bankruptcy petition on July 29, 1982, tolled the FTCA statute of limitations for two years. As a result of the tolling, the plaintiff maintained that its February 15, 1984, claims presentment fell within the statute of limitations. In affirming the district court's partial dismissal of the claims as time-barred, the D.C. Circuit held that "the FTCA presentment requirement should be considered a 'notice or proof of claiin' under § 108(b), rather than an 'action' under

§ 108(a)." *Id.* at 640. The court noted that the FTCA considers the presentment of an administrative claim a "logical and a temporal antecedent to the prosecution of any tort' action."' Id. at 640.

The Eagle-Picher decision nearly mirrors the circumstances here. Like the *Eagle-Picher* plaintiff, Cloud filed for bankruptcy and claimed the two-year tolling protection of section 108(a). However, as the D.C. Circuit artfully explained, only an "action," as defined by section 108(a), justifies the two-year tolling because it "is a more substantial and involved undertaking than the filing of a 'claim.'" *Id.* at 640. Cloud contends, on the other hand, that "compilation of an administrative claim for presentment under the FTCA is actually more onerous than filing suit." (Instrument No. 38, at 18). Indeed, he argues that the purpose of section 108(a) is "completely frustrated" by limiting the presentment of administrative claims to the 60-day tolling period under section 108(b). (Id.). Cloud's arguments, however, have no support in the law. In enacting the presentment requirement to the FTCA, the Congress sought "to avoid unnecessary litigation and to expedite fair settlement of tort claims asserted against the United States." *Eagle- Picher,* 937 F.2d at 640. Moreover, "Congress understood these claims presentation statutes as requiring only minimal notice." Id. Accordingly, section 108(b)'s reference to the "fil[ing of] any pleading .... or proof of claim or loss, ... or [the] perform[ance of] any other similar act" encompasses the minimal notice implicated by an administrative claim presentment. Id. Although Cloud asserts that "[ilt does not make sense to give a trustee a two-year extension to file suit under the Federal Torts Claims Act but a sixty-day extension to file an administrative claim," (Instrument No 3t at 18Y le law squarely indicates otherwise:

> Because presentment requires only 'minimal notice,' the initiation of a tort claim against the government is far less costly and far easier than the initiation of an action against a nongovernmental tortfeasor. Given this lesser burden on FTCA claimants it is neither unfair nor inappropriate for § 108(b)'s shorter tolling period to apply to FTCA tort claims while § 108(a)' s two-year period applies to all nongovernmental tort actions.

Eagle-Picher, 937 F.2d at 640.

Analogously, a decision by the Fifth Circuit in *TLI, Inc. v. United States,* 100 F.3d 424 (5th Cir. 1996), reflects the reasoning of *Eagle-Picher. In TLI,* the taxpayer sought a refund in 1989 for incorrectly assessed and collected taxes in 1984. The taxpayer argued that section 108(a) extended the time for it make its administrative refuaid claim by two years. Specifically, it maintained that 108(a)'s "commence[ment of] an action" language includes the filing its administrative claim. In affirming the district court's grant of the United States' motion for summary judgment, the Fifth Circuit held that "[w]hile an administrative refund application must precede a tax action, it does not commence *it." TLI,* 100 F.3d at 427. The court explained that, taken in its ordinary context, "action" refers to a lawsuit brought in court. Id. (quoting Black's Law Dictionary 28 (6th ed. 1990)). Similarly, within the framework of the Federal Rules of Civil Procedure, the court noted that Rule 3, aptly entitled "Commencement of Action," defines it in this way: "A civil action is commenced by filing a complaint with the court." Id. (quoting Fed.R.Civ.P. 3).

Like *TLI,* Cloud argues that his administrative claim is encompassed by section 108(a)'s "action." Just as a administrative tax refund claim does not commence litigation, Id., however, Cloud's administrative claim under

the FTCA does not, either. Rather, an administrative claim under the FTCA, like an administrative tax refund claim, is a jurisdictional requirement that necessarily precedes any litigation. *See GAF Corp. v. United States,* 818 F.2d 901, 918 (D.C.Cir.1987) (holding that the Congress instituted the presentment requirement "as a precondition to filing suit" in order to reduce the "filing of large numbers of suits which might be settled out of court"). Thus, although Cloud believes that the filing of an administrative claim warrants section 108(a)'s two-year tolling because "[t]he process for submitting a claim under the FTCA is far more complex than filing a lawsuit," (Instrument No. 38, at 19), the law plainly indicates that section 108(b)'s sixty-day tolling applies to the filing of administrative claims. *TU, 100* F.3d at 427; *Eagle-Picher,* 937 F.2d at 640.

Because Cloud's bankruptcy petition only tolled the FTCA statute of limitations for sixty days under section 108(b), Cloud was required to present his administrative claim to the DOJ by approximately January 26, 1998. Clouds presentment of his claim in March 1999, consequently, was time-barred.

C.

Although the United States has moved for a complete dismissal of Cloud's complaint, Cloud argues in a footnote that, based on 11 U.S.C.A. § 106(c) (2000), the United States is only eligible for a "partial dismissal." Cloud asserts that, even if this Court finds that the United States' sovereign immunity from suit has not been abrogated under the FTCA, there is an independent basis for the immunity's waiver. Under section 106(c), "[n]otwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate."

According to Cloud, the United States has "made a claim in Cloud's bankruptcy ... [in the amount of] $1,574,029.00." (Instrument No. 38, n. 1, at 1). Under his reasoning, the FTCA lawsuit constitutes "any claim against such governmental unit that is property of the estate" as defined in section 106(c). Because the United States' alleged claim in Cloud's bankruptcy must be "offset," 11 U.S.C.A. § 106(c), against his FTCA claim, Cloud urges the Court to find that the United States' sovereign immunity is abrogated.

The Court finds Cloud's reasoning unpersuasive. Section 106(c)'s abrogation of sovereign immunity was designed to prevent a party from losing its opportunity to file a compulsory, as opposed to a merely permissive, counterclaim against the "governmental unit." *See In re Rebel Coal Co., Inc.*, 944 F.2d 320, 321 (6th Cir. 1991). According to Federal Rule of Civil Procedure 13(a), a compulsory counterclaim exists "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim," Here, there is no allegation that Cloud's malicious prosecution lawsuit "arises out of the transaction or occurrence that is the subject matter" of the United States' alleged claim in Cloud's bankruptcy. Furthermore, even assuming Cloud's FTCA action against the DOJ qualifies as a compulsory counterclaim, there is no evidence that the DOJ is the "governmental unit" asserting a stake in Cloud's bankruptcy. The text of section 106(c) specifically provides that a party's compulsory counterclaim must be directed against the same "governmental unit" responsible for filing a claim against the party. 11 U.S.C.A. § 106(c) ("there shall be offset against a claim or interest of *a governmental unit* any claim against *such governmental unit* that is property of the estate" (emphasis added)).

Finally, assuming *arguendo* that section 106(c) appropriately abrogates sovereign immunity in the circumstances here, Cloud is not somehow immune from the FTCA's statute of limitations. To the extent that Cloud's FTCA suit constitutes the compulsory counterclaim that will "offset" the United States' claim in his bankruptcy, he was still required to abide by the time period strictures set forth in the FTCA.

IV.

Based on the foregoing, the Court finds that the United States' motion to dismiss should be **GRANTED.**

The Clerk shall enter this Order and provide a copy to all parties.

ENDOF DOCUMENT

United States District Court,
S.D. Texas, Houston Division.

UNITED STATES of America,
Plaintiff,
v.

Lawrence E. RAMMING, John Thomas Cloud, Fred E. Wiggins, Jr., Robert A. Briggs, Scott H. Phillips, John A. Herrin, James L. Emerson, Thomas A. Fry, III, Thomas J. Lykos and Paul Licata,
Defendants.

Criminal A. No. H-94-181.

[Entered: January 12, 1996]

United States Attorney's Office, Washington, DC, for U.S. Dan L. Cogdell, Houston, TX, for Lawrence E. Ramming. Michael W. Ramsey, Houston, TX, for John Thomas Cloud. Terry Collins, Harrisburg, PA, for Fred E. Wiggins. Robert Shults, Stephen Lemmon, Houston, TX, for Robert A. Briggs. Jack Zimmennan, for Scott H. Phillips. Wendell Odom, Houston, TX, for John A. Herrin. William Burge, Baltimore, NM, for James L. Emerson. Chris Bacon, for Thomas A. Fry, III. Theo Pinson, Houston, TX, for Thomas J. Lykos. Robert Moen, Vancouver, BC, Canada, for Paul Licata.

ORDER OF DISMISSAL

HOYT, District Judge.

This criminal case arises out of various financial transactions that occurred between Memorial and Wilcrest National Banks, Oxford Funding Corporation and various third party corporations. The defendants have moved for an judgment of acquittal, pursuant to Rule 29 of the Federal Rules of Criminal Procedure, and dismissal based on

prosecutorial misconduct. As well, there is a pending motion to suppress the evidence seized pursuant to a search warrant because there was no probable cause for its issuance.

Having heard the evidence, reviewed the appropriate documents and exhibits and taken into consideration the previous arguments from all sides, the Court is of the opinion that both the motion for acquittal and the motion to dismiss based on prosecutorial misconduct shall be granted. The motion to suppress shall be denied.

The Indictment:

In the first of a 27 count indictment, the government charges the defendants with conspiracy to defraud federally insured financial institutions by: (a) use of interstate wire facilities; (b) misapplication of funds; (c) making false entries in the records of the subject institutions; (d) offering something of value to a bank officer to influence that officer; (e) agreeing to accept something of value by a bank officer for the purpose of being influenced in connection with the banks' business; (f) taking and carrying away bank property with the intent to steal; and, (g) conducting a financial transaction with proceeds of an specified unlawful activity knowing that the transaction was designed to conceal the nature, location, source, ownership, or control of the proceeds.

Twenty-five (25) counts of the indictment charge the defendants in various combination with the substantive charges of bank fraud, wire fraud, misapplication of bank funds, false entries in bank records, bank bribery, bank larceny, and money laundering.

The final count seeks criminal forfeiture of all property to which the alleged proceeds of the unlawful activity may be traced. And, in the event that the actual property subject to forfeiture cannot be obtained, substitute assets are sought in place or instead of the forfeited property.

Government Contentions:

The government contends, as it relates to the conspiracy and bank fraud charges, that the defendants, knowing that Memorial Bank, N.A. and Village Green National Bank were troubled institutions, "put into operation a scheme to artificially enhance the financial positions of Memorial and Village Green for the purpose of preventing or delaying a takeover of the banks by the regulators." The government asserts that this scheme was accomplished by "creating sham transactions involving the 'sales' to be returned clandestinely to the banks as newly injected capital from an independent source." To this end, it argues that "straw buyers" such as Amalgamated Oil and Gas Company ("AOG"), First City Realty Corporation (FCRU), and Credit Recovery Corporation ("CRC") were created simply to make specific purchases of charged- off loans, personal property and real property in possession of the banks as a result of prior foreclosures and write-offs, with proceeds derived from the sale of various loan packages to the banks.

As facts supporting its charge of conspiracy and bank fraud, the government points to the fact that: (a) Robert J. Creighton, a contract employee of Memorial and later Oxford, became the president of CRC; (b) Mary Jane Haines, the wife of John Thomas Cloud and a principal of Oxford, was named president of AOG; and, (c) James Harold Carpenter, contract employee of Oxford, served as president of FCRC. The government asserts that by creating

these "sham" corporations, the defendants intended to conceal the fact that the sale and purchase transactions were related, thereby denying the Office of the Controller of Currency ("OCC") and the Federal Deposit Insurance Corporation ("FDIC") the appropriate oversight functions that they usually and customarily exercise.

It is charged by the government that the defendants accomplished the conspiracy and bank fraud by proposing to the directors of the bank, in related transactions, that Oxford would sell to the banks packaged real estate loans at inflated prices and funnel proceeds from the sale of those packages to corporations such as AOG, FCRC, and CRC for the purposes of purchasing selected troubled assets from me banks. The purpose of this procedure, according to the government, was to conceal from the OCC and the FDIC that the transactions were related and that the entities were using the banks' own funds to purchase trouble assets from the banks.

The effectuation of this alleged conspiracy and bank fraud scheme gives rise to the substantive offenses charged in counts three (3) through twenty-six (26) and the forfeiture count is charged in count twenty-seven (27).

Conspiracy and Bank Fraud Defined:

A "conspiracy" is an agreement between two or more persons to join together to accomplish some unlawful purpose. Title 18 U.S.C. § 371. For a jury to find any defendant guilty of conspiracy, it must be convinced that the government has proved beyond a reasonable doubt that: (a) two or more persons made an agreement to commit the offenses as charged in the indictment; (b) the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose; and, (c) one of the conspirators, during the

existence of the conspiracy, knowingly committed at least one of the overt acts described in the indictment in order to accomplish some object or purpose of the conspiracy. Id. at § 37L The conspiracy as alleged, in the case at bar, asserts a scheme to defraud federally insured financial institutions as provided in Title 18 U.S.C. §§ 1343, 1344, 656, 1005, 215, 2113(b) and 1956(a)(1)(B)(i), by selling packaged notes to the banks and, in turn, through subsidiaries or third parties, purchasing troubled assets from the same banks. At all times during the alleged conspiracy, mid-1989 to on or about May of 1991, the banks were operating under a "Cease and Desist Order", which order prevented the banks from making any substantial loans. Simultaneously, the banks were under regulatory supervision and were charged with the duty to enhance their capital positions.

The Defendants' Position:

The defendants assert that the sale of packaged notes to the banks and the purchase back of troubled assets from the same banks were mutually beneficial. They argue that the "Yield Program"[1] offered to the banks by Oxford permitted the banks to legitimately enhance their capital accounts by acquiring an income stream superior to the ones that could be generated by new loans, while simultaneously disposing of troubled assets. They further argue that the transactions were not "trash for cash schemes," the notes were not sold at inflated prices, the troubled assets purchased from the banks were not worthless, and the transactions were appropriately documented in the records of the banks.

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1 The details of the yield program are not important to this discussion. However, the program was designed by Oxford for the purpose of enhancing a capital poor bank's position by selling to the bank high yield loan packages and purchasing troubled assets from the same bank.

Discussion:

Conspiracy and Bank Fraud.

The bank fraud charge is joined for the purpose of this discussion, with the conspiracy count because the proof required of the government is essentially the same. To prove bank fraud, the government must establish, beyond a reasonable doubt, that the defendants engaged in a scheme to obtain money from the banks under false pretenses, knowing that the false pretenses would both influence the bankers and deceive the regulators. Title 18 U.S.C. § 1344.

In order for the government to avoid a Rule 29 motion on the conspiracy count, there must be some evidence on each of the necessary elements sufficient for the Court to determine that a jury could find that the crime of conspiracy occurred, beyond a reasonable doubt. *United States v. Malatesta,* 590 F.2d 1379 (5th Cir.1979). *See also United States v. Salazar,* 958 F.2d 1285 (5th Cir.1992).

If the transactions between Oxford and the banks had "economic substance" then several of the offenses that make up the conspiracy and bank fraud charges fail. The government suggests that these transactions were without economic substance because the real estate loan packages were sold to the banks at inflated prices, essentially "cooking" the banks' books. On this point, the Court determines that *United States v. Beuttenmuller,* 29 F.3d 973 (5th Cir. 1994), is instructive.

In *Beuttenmuller,* the government charged the defendant, among others, with conspiracy to commit bank fraud and aiding and abetting the making of false entries in credit institution reports. The government argued that the transaction was illegal because it was a "cash for trash" transaction. A "cash for trash" scheme is an illegal scheme

where an institution sells real estate owned, ("REO") that has been wholly financed by the institution that owns it, in violation of banking regulations that require at least a 20 percent down-payment. Id. at 979. In these type transactions the parties may pretend that the down-payment was made by the purchaser, when in truth it was not. [2]

In the case at bar, the transactions were "value-for-value" transactions. Specifically, the banks were willing purchasers and willing sellers. Oxford was a willing seller and the third-party entities were willing purchasers of the REO. In all instances, the parties received what they had purchased, and there was adequate consideration on both sides of the transactions negating any claim of actual fraud The fact that the banks purchased the loan packages on a dollar-for-dollar basis is of no moment. This type transaction is nothing more than value-for-value transaction. The fact that Oxford and the banks, as a part of the agreement between the parties, agreed to spend at least 20 percent of either the gross sale or net profit for the REO, is not illegal. Because the banks needed to increase their capital accounts, it logically follows that they would want to "unload" REO because its presence on the books diminished the banks' capital positions, thereby diminishing funds available for loans. Moreover, the evidence fails to establish that the REO had greater values than the values attributed to them, or that the loan packages had lesser values than the values attributed to them.

The government argues that because Oxford and the third-party entities were related in some respect, the transactions were not properly recorded on the books and records of the banks. Thus, it argues that the conspiracy and

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[2] The government is of the opinion that the Louetta property was not booked correctly in accordance with FASB 66. Yet, they are aware that the bankers relied upon the opinion of Sam Pierce, an outside CPA, in choosing the accrual method of booking.

bank fraud charges have as their "central core" the concealment of material information from bank examiners and the financial institutions.[3]

This argument too, fails. The argument presupposes that there were recording requirements that were not accomplished. Alternatively, it presupposes that the entries made were false or inaccurately recorded, or that Oxford and the banks' directors and officers had a duty to explain the transactions to OCC and FDIC officials. Neither of these suppositions is founded in the law and neither is it supported by the evidence. On the contrary, the transactions were properly documented and the records were at all times available to the banks' regulators.

The evidence also shows that Robert J. Creighton performed the due diligence on the note packages. He testified that the notes were income producing, had good collateral, and would increase the banks' capital accounts. The evidence shows that the regulators reviewed documents associated with the purchased assets, and passed upon them. Even considering the issue of the credibility of Creighton, it is undisputed that the board of directors of the banks discussed and approved the purchases and sales. For the regulators to look to the loan committee minutes for evidence of the transactions was not only foolish, it missed the point. Moreover, the fact that the OCC regulators looked at the transaction as though they were loan transactions is not controlling. These transactions were bulk sales transactions, capital acquisitions, made pursuant to Uniform Commercial Code. [4] Therefore, no record should exist in the minutes of the loan committee concerning capital acquisitions.

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[3] Government's memorandum of law regarding admission of evidence, filed December 4, 1995.

[4] See Vernon Tex. Code Ann., Bus. & Comm. §§ 6.1.01 *et. seq.* and 9.101 *et. seq.* (Vernons 1991).

The government next argues that changes were made in the documents that deceived the banks and the regulators concerning the true nature of the transactions. In this regard, the evidence shows that in several instances changes were made in the "interest due" column. Gumm, the OCC regulator claims that he relied upon this summary in reviewing and commenting on the acceptability of the transactions.

The fact is, these changes dealt with closing the transaction with a current "interest paid" status and never altered the "pay history" of the individual loans. To the extent that these modifications could arguably represent altered documents, the alterations did not result in any false entries being made on the books and records of the banks. As well, the modifications did not constitute bank fraud because the basis for the bargain did not change and there is no evidence that the changes in the "interest paid" summaries were material to the permanent records of the banks. The amount of the loan due, the collateral, and the pay history, did not change. The bank got what it paid for.

Also, these transactions did not violate the Tying Act.[5] The Tying Act contemplates a circumstance where a bank official coerces a customer to engage in a unrequested transaction in exchange for the requested transaction. Here, the transactions were arms-length between parties who had negotiated the desired terms.

The government's assertion that the sellers' closing statements were not in the banks is also without legal foundation. The evidence fails to establish that the sellers' closing statements were required documents for the banks, or that the Oxford defendants had a duty to provide or disclose them. *See Lubin v. United States*, 313 F.2d 419, 422

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[5] See 12 U.S.C. § 1971 *et. seq.* stating, "A bank shall not ... extend credit ... on the condition ... that a customer ... obtain additional credit....

(9th Cir. 1963). It is logical that the banks would be in possession of their own closing statements. In fact, Creighton testified that he personally delivered the bank's closing documents to the bank after each closing. This testimony is supported by an FDIC official's testimony identifying the records in the FDIC's files.

The government's suspicions surrounding Oxford's closing statements is nothing more than suspicions. It is not the province of the banks to know what Oxford did with the proceeds that it earned from the sale of the note packages. In fact, how the funds were used was the personal business of Oxford. The banks had no right to know and Oxford had no duty to disclose how it was spending its own money.

The government next argues that had the regulators known that Oxford and the third-party entities were related they would have collapsed the transactions. In other words, had they known that the sale of the loan packages were related or conditioned upon Oxford or a third-party entity purchasing REO, the regulators would have collapsed the transactions. The fact that the regulators may have chosen to collapse the transactions is immaterial to a criminal prosecution. The question proper is whether a crime was committed by the bankers, Oxford and the third party entities. The object of the Yield Program was not concealment, on the contrary, it was disclosure.

The issue from the banks' perspective was how may the transactions be documented such that the banks' capital position could be improved. It was the parties' intent to improve the banks' capital accounts. The creation of third-party entities by Oxford was done for the purpose of legitimizing the transactions. Both Oxford and the bankers knew that the regulators would not favor a purchase and

sale between the same entities.[6] The evidence fails to establish that the transactions were related in an illegal way, without regard for whether the transactions could or would have been collapsed.[7] The fact is the regulators never collapsed the transactions even though they learned about the relationship between the parties before the banks were declared insolvent. Moreover, the transactions were not fraudulent simply because the regulators were unaware of Oxford or the third party entities. Oxford's profits were Oxford's to do with as it saw fit.

Finally, there is no evidence that any relevant documents were forged, backdated, or destroyed. The government argues that the evidence that documents were removed from the banks, or are otherwise missing, is evidence of "consciousness of guilt." This theory, it argues, finds supports in the case law *citing United States v. Gleason*, 766 F.2d 1239 (8th Cir. 1985). However, there is no evidence, and no proffer has been made, showing that any records that were removed from the banks, or that were destroyed, were relevant to the crimes charged. Thus, testimony that records were removed or destroyed is not probative of a consciousness of guilt where relevance is not first established.

The government also charges that something of value was offered to bank officials for the purpose of influencing their decision concerning whether to engage in

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[6] Such a transaction would not be illegal, however. The effect of the transaction on the books of the banks may have been different where the two transactions are between the same parties.

[7] An agency official testified that the booking of the transactions were governed by FASB 2, 5 and 66 and particularly, Opinion 21 paragraph 12. To the extent that these accounting principles represent the structure for how real estate transactions ought to be recorded, so be it. To vary from these principles is not to commit a crime but, when a crime has been committed, the variance may explain one's intent.

the transactions. First, the government argues that the banks would not have purchased the loan packages without the reciprocal agreement from Oxford or the third-party entities, that REO or other written-off loans would be purchased. This influencing argument overlooks the fact that this term was a basis of the bargain. The banks sought to improve their position by purchasing the loan packages and selling charged-off loans. It is apparent that this was nothing more than a negotiated position. It was the bankers who insisted upon this term--and for good cause. They sought to protect the integrity of the transactions and to comply with the regulators' demand that the capital accounts be improved.

Second, the government argues that the Oxford defendants sought to purchase the stock note obligations that supplied part of the original capital for the banks. To discuss with the Oxford defendants the possibility that the Oxford defendants may be interested in purchasing the positions of the directors of the banks, is a violation of § 215, according to the government, particularly, where the banks are being encouraged to purchase more loan packages as a bargaining chip. The evidence does not support this charge.

It was known by the bankers and within the Oxford circle that Oxford was interested in purchasing a bank. However, the purchase was sought only to "shore-up" Oxford's position in the market. Oxford wanted a free hand in the banks "till" to ensure a steady stream of business. The evidence failed to establish that any banker was offered or received anything of value that influenced this decision. On the contrary, it was the heat from the regulators and the desire to save the banks that "spurred" the bankers into these transactions.

The Court concludes that no rational jury could find, beyond a reasonable doubt, that the defendants engaged in a conspiracy or bank fraud of the sort stated in the indictment. *Salazar,* 958 F.2d 1285. The Court turns next to the evidence as it relates to the remaining substantive counts in the indictment. *United States v. Burns,* 597 F.2d 939 (5th Cir. 1979)

FALSE ENTRIES IN THE BOOK:

In ten (10) counts the government charges that the defendants engaged in, or aided and abetted engagement in, the misapplication of bank funds and in making false entries in the books and records of the banks. Title 18 U.S.C. §§ 656 and 1005. A violation of § 1005 is usually involved when there is a violation of § 656, because a false entry is often used to cover-up the misapplication. However, a violation of internal operating procedures and failure to disclose conflicts of interest do not, in themselves, constitute federal criminal violations. *United States v. McCright,* 821 F.2d 226 (5th Cir. 1987), *cert. denied,* 484 U.S. 1005, 108 S.Ct. 697, 98 L.Ed.2d 649 (1988). Likewise, a bank officer cannot be found guilty of misapplication based solely on a violation of a bank regulation. United *States v. Christo,* 614 F.2d 486 (5th Cir. 1980).

In order for the government to prevail on a § 1005 charge of false entries, the government must establish the following elements, beyond a reasonable doubt. The government must prove that the defendant was an officer, director or employee of an institution covered by the statute, that the defendant made or aided another in making entries in the books and records of the institution, which the defendant knew to be false, and that the defendant acted with the intent to injure or defraud the institution.

In the case at bar, the government asserts that the bankers failed to disclose in the banks' books that funds received by the banks, in the purchase of REO or troubled assets from the third-party entities, were derived from the funds paid to Oxford during the purchase by the banks of loan packages from Oxford. The government refers to the purchase of the troubled assets as "sham" purchases. It refers to the corporations that made the purchases as "sham" corporations.[8] The sole basis in argument for this characterization is the fact that Oxford supplied or loaned the funds to these third-party entities in order that the entities could make the described purchases from the banks. These transactions had nothing to do with me bank's records.

The purpose of a bank's records is to insure that regulators or inspectors may see an accurate picture of a bank's condition. *United States v. Baker,* 61 F.3d 317 (5th Cir. 1995). It is not the province of the inspector to know the details of every transaction that makes up the picture. To be a false entry, the entry must be an omission of material information that impairs or prevents the function of the government agency. *See Beuttenmuller,* 29 F.3d at 982.

The government argues that the defendants omitted telling the regulators that Oxford and the third-party entities were related entities and that this failing was deliberate, designed to deceive. This argument overlooks the fact that Oxford acted as a broker in these transactions. Oxford found a willing seller and a willing purchaser and kept the two apart in order that it could later act as the seller of the loan packages by conducting a double closing. By handling

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[8] "Sham" corporation is a misnomer. It is undisputed that the corporations in this case were legally created under the laws of the state of Texas. Whether they functioned in accordance with the law or were used to defraud are questions of fact requiring proof. The fact that they were single purpose corporations is not dispositive of the issue.

the transactions in this manner, the right hand did not know what the left hand was doing and Oxford was able to increase the commission that it had been able to earn from a distressed seller. Even if it were argued that Oxford was the seller, it could be so only for a fleeting moment. The most accurate description of Oxford's role, however, is that of a broker.

As these facts apply to this case one can readily see that two of the elements of the offense of false entries are not supported by the evidence, beyond a reasonable doubt. First, the entries made on the books of the banks were not false. In fact, the entries were correct. The dispute then moves to how the entries should have been treated on the books from an accounting perspective. The debate was over whether the "legal effect" of the transaction should prevail or not over the "economic substance" of the transaction.[9] Even assuming that the economic substance theory prevails accounting for the transaction based on the legal effect of the transaction does not make the entries false. It simply focuses the discussion on the value of the transaction from the seller's and buyer's perspectives. A false entry is not made where the transaction entered actually took place, and are entered exactly as they occurred. *See Coffin v. United States*, 156 U.S. 432, 463, 15 S.Ct. 394, 406, 39 L.Ed. 481 (1895).

Here, the transactions were recorded exactly as they occurred. The fact that regulations or accounting principals would dictate an accounting treatment different than the treatment given, even if the parties intended to defraud the bank, is not a false entry. *United States v. Manderson*, 511 F.2d 179, 181 (5th Cir. 1975). The record and the evidence shows, additionally, that the defendants' actions were designed to help, as opposed to injure, the banks. Even if

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9 See footnote number 6, *supra*.

the entries could be labeled as false, and the Court is not concluding that to be the case, the fact that they were properly recorded negates the offense of false entry. *Coffin*, 156 U.S. at 463, 15 S.Ct. at 406.

MISAPPLICATION OF BANK FUNDS:

Likewise, the charges of misapplication must fail. To prove misapplication of funds the government must prove that an officer, director or employee of the bank insured by the FDIC, knowingly and willfully misapplied monies of the bank with intent to injure or defraud the bank. *United States v. Mann*, 517 F.2d 259, 267 (5th Cir. 1975), *cert. denied*, 423 U.S. 1087, 96 S.Ct. 878, 47 L.Ed.2d 97 (1976). Intent to defraud means to act with intent to cheat or deceive either to cause a financial loss to someone or a financial gain to one's self. *See* United States Fifth Circuit, *Pattern Jury Instructions*, Criminal Cases (1983). A showing that entries were correctly recorded, resulting in funds being disbursed pursuant to an agreement and the transaction, is not a misapplication of funds.

The misapplication referred to in the relevant indictment charges that, at the time of the transactions between the banks and Oxford, both sides knew that a portion of the sale proceeds would be returned to the banks in exchange for troubled assets. *See* Title 18 U.S.C. § 656. At most, this argument shows a linkage between the two transactions, in which event, the transactions may be collapsed. The fact that the transactions may be collapsed under an "economic substance" theory does not mean that the transactions were irregular and should be reversed. Moreover, it does not make the transaction illegal. Violations of banking regulations as it pertains to how a transaction is booked is no evidence of a crime. *See United States v. Cleary*, 565 F.2d 43, 47 (2nd Cir. 1977) *cert. denied*, 435 U.S. 915, 98 S.Ct. 1469, 55 L.Ed.2d 506 (1978). Therefore,

the Court must look to determine what evidence exists suggesting that the bankers intended, by their conduct, to injure or defraud the bank. *See United States v. Adamson*, 700 F.2d 953 (5th Cir.), *cert. denied*, 464 U.S. 833, 104 S.Ct. 116, 78 L.Ed.2d 116 (1983). On this point, it should be noted that violation of a bank's policies or procedures intended to protect the bank's interest is also relevant to the issue of intent. *United States v. Clark*, 765 F.2d 297) 303 (2nd Cir. 1985).

Here, the evidence shows that the banks were under an order to increase their capital accounts. The bankers engaged in the transactions stated in the indictment for the purpose of increasing the capital of the banks, not for the purpose of injuring or defrauding the banks. The effect of a particular conduct can be a crime only when the effect was the bankers' intent. Here, no inferences of a crime can be drawn from the bankers' conduct because their intent is not in dispute. They intended to save the banks.

Applying the basic principle of *Ejusdem generis, it* is evidence that to constitute misapplication of funds, within the meaning of the statute, the bank officers' conduct must involve some risk of loss to the bank as opposed to a violation of a regulation, bank policy or accounting principle designed to account for assets. *Clark*, 765 F.2d at 303. Moreover, the fact that a bank official makes a transaction that is legal or appropriate with knowledge that the recipient of the sale proceed will turn around and lend part of those proceeds to a third party is not a crime. *Compare United States v. Adamson*, 700 F.2d 953, 956 (5th Cir. 1982) *cert. denied*, 464 U.S. 833, 104 S.Ct. 116, 78 L.Ed.2d 116 (1983).

The Court concludes that no reasonable jury could find the defendants guilty of the offenses of making false entries in the books of the banks and misapplication of bank funds, beyond a reasonable doubt. *Salazar*, 958 F.2d 1285.

The indictment in this case also charges wire fraud, bank bribery, bank larceny, money laundering and forfeiture. These charges are derivative, or related to the crimes of conspiracy to commit bank fraud and bank fraud. Therefore, these substantive charges will be examined to the extent necessary to determine whether the evidence supports a submission to the jury. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Bribery Charges:

A person commits bribery when he offers something of value to anyone with the intent to corruptly influence or reward an officer, director, employee, agent or attorney of a federally insured financial institution in connection with a transaction. Title 18 U.S.C. § 215. The indictment charges that Oxford defendants offered to purchase the debts and obligations of various bank officials.

The evidence shows that the Oxford defendants, at a point in time, determined that they wanted to purchase a bank(s). Contact was made with various directors and/or shareholders regarding their individual interest, if any, in selling the note obligations associated with the purchase of Memorial and Village Green stock. The Oxford defendants apparently thought that a straight purchase would require a different approval process from the OCC, than one where they purchased the note obligations and simply foreclosed on the occasion of any default in payments. It is not disputed that the note obligations were located at banks other than Memorial and Village Green.

Pursuant to the plan to boost the capital accounts of Memorial, Creighton solicited letters of commitment from individuals to the effect that the individuals intended to invest a substantial sum of money in the banks. Letters from individuals such as James Carpenter were forwarded to Memorial. Creighton testified that Carpenter never intended to purchase the bank's stock but had provided the letter because an Oxford official had requested that he do so. Whether Carpenter intended to make a purchase or not, it is undisputed that others did.

First, the government argues that this conduct, providing a false statement of intent, is relevant to show the Oxford defendants' predisposition to take control of the banks without revealing in advance to the OCC who the real purchasers would be. This conduct does not constitute bribery and it does not amount to bank fraud or conspiracy, as contemplated and charged by the indictment. Of equal significance, is the fact that this conduct did not affect any entries in the books and records of the bank, such that the soundness of the bank was implicated.

Secondly, no crime is committed by the bank officials or Oxford officials in their effort to stall a take-over of the institution by the FDIC. It was the bank officials' fiduciary duty to the stockholders and depositors to do every legal act to turn the banks around. If turning them around meant delaying the regulators in their efforts, so be it, so long as no crime was intended. It is clear that the officials on both sides of the transactions were keenly interested, if only for selfish reasons, to "fix" the capital account problems at the banks.

Finally, it is of no moment that the Oxford officials attempted to take-over the banks through note purchases. The obvious is that several, if not all, of the stockholders wanted out because to get out would limit their financial

exposure. Specifically, if the FDIC stepped in and closed the institution, the stockholders would lose twice, if not three times. First, they would lose their investment in the banks. Second, they would remain obligated to pay-off the underlying stock notes that had been used to purchase the banks. And third, there is the potential for civil and criminal exposure concerning the decisions that were made during their terms as stockholders and directors, and potentially beyond.

The government's allegation mm me stock purchase offers were made simply to encourage the banks to engage in additional transactions with Oxford, is not well founded. There was more to this engagement than first meets the eye. No change of control of the banks ever occurred and there is no evidence that the plan to purchase the notes underlying the bank stock was ever consummated. In fact, the evidentiary cupboard is bare of any benefit to the banks or the banks' official from Oxford that was not a pas of the transaction agreements made the basis of this indictment.

No jury could find, beyond a reasonable doubt, that the acts described herein constituted a bribe of bank officials because no request was made of a bank official that was in violation of the officials' duty. *Malatesta*, 590 F.2d 1379.

And, because no bribe was offered, no bribe could be received. This count of the indictment fails as you consider the reasoning heretofore stated. As well, there is no evidence that any bank official did any act or failed to do any act in violation of his official duty. Therefore, no jury could find, beyond a reasonable doubt, from the acts described in the indictment as they relate to the evidence, that a crime was committed. Id.

Bank Larceny:

In a single count, the government charges that the defendants committed the offense of bank larceny in violation of Title 18 U.S.C. § 2113(b). Bank larceny occurs when a person deprives the bank of its property under false pretenses--to take without adequate consideration. Id.

The essential elements of this offense requires the government to prove, beyond a reasonable doubt, that an individual, with intent to steal money or property belonging to a federal bank, willfully or intentionally removed such property from the care, custody, control, management or possession of the bank. Ibid

In the case at bar, the government alleges that the defendants caused diamonds, representing part of the collateral for a loan, and acquired by the bank through a foreclosure, to be taken from the bank under false pretenses in connection with a scheme to defraud the bank. The basis of this charge is "rooted" in the governments charge of bank fraud and conspiracy.

It is the Court's view, and the evidence supports the conclusion, that each of the transactions were "value-for-value" transactions, that the diamonds in question left the bank only after adequate consideration was paid, and that the consideration paid was agreed to by the bank officials. While the government argues that the effect of the transaction placed the diamonds in the hands of Oxford officials and that the funds used were bank funds, these arguments are not supported by the evidence and are based on a preference of economic substance over legal structure. While a federal agency may ignore legal structure in determining how it will "book" a transaction in the records of a bank, it may not ignore the legal effect of legal structures that are designed by the state legislatures and Congress, the law makers.

In summary, the bookkeeping treatment dictated by general accounting principles or by regulators cannot "trump" state and federal law that dictate the structure of business transactions. As matter of law, this count fails.

Wire Fraud Charges:

In three (3) counts, the government charges that the defendants committed wire fraud. It is alleged that on two occasions in December 1989, and one occasion in March 1990, that the defendants caused the transmittal of certain writings, etc., between the states of Texas and Oklahoma and Texas and Chicago. The allegations are that money was wired and documents were transmitted by facsimile to these locations with the intent to defraud the OCC, the FDIC, as well as the banks. The ultimate purpose being to obtain money and property by means of false pretenses.

In order to establish these counts the government must prove, beyond a reasonable doubt, that the defendants devised a scheme to deprive the banks of the benefit of if s bargain or the depositors' money, and acted with intent to do so utilizing the wire service to carry out the scheme. Title 18 U.S.C. § 1343.

In the ordinary or usual case of wire fraud, the government must establish that the use of the wire service was an *important* part of the scheme. *See Criminal Jury Instructions,* Fifth Circuit, *comment following instruction* (1983). Therefore, it is not wire fraud if the use was only incidental to a crime. In other words, if the object of the crime cannot be committed except through the use of the wire service, then the additional crime of wire fraud is chargeable and provable. As well, if the wire service is used to effect or further a crime that has been committed, then the crime of wire fraud is implicated. Id.

Assuming that no crime was committed arising out of the transactions made the basis of this indictment, and the Court has found that no conspiracy, bank fraud, misapplication of bank funds, false entries in bank records, bank bribery or bank larceny has been proved, the fact that the wire service was used on December 7 and 9, 1989, and March 8, 1990, is of no moment. It, therefore, is not an important part of a scheme to defraud the banks.

The Court holds that, because there was adequate value on both sides of the transactions at issue, no fraud occurred. Incorporating the Court's previous reasoning here as well, it is the Court's opinion that the use of the wire service was not an *important* part of the alleged conspiracy, bank fraud, misapplication of funds, false entries, bank bribery or bank larceny. Under these facts and in this circumstance, no jury could find, beyond a reasonable doubt, that the crime of wire fraud was committed. *Malatesta*, 590 F.2d 1379.

Money Laundering Counts:

In eight (8) counts, the government charges that the defendants engaged in money laundering in violation of Title 18 U.S.C. § 1956(a)(1)(B)(i). The government asserts that the defendants conducted financial transactions with proceeds that they knew were derived from unlawful activities, i.e., misapplication of bank funds and bank fraud, with knowledge that the purpose of the transactions was, in part, to conceal me ownership of me proceeds.

In order to prevail on these counts, the government must prove, beyond a reasonable doubt, that the relevant defendant knowingly received proceeds that resulted from bank fraud or misapplication of bank funds with the intent to conceal the source or true ownership to avoid or prevent the regulators from knowing that the transactional proceeds were used to either purchase charged- off loans from the banks or to invest in other ventures. Id.

The operative determination in this analysis, is whether a crime was committed from which it could be said that proceeds were laundered. The eight counts deal with the handling of the proceeds derived from Memorial and Village Green banks as a result of le sale of loan packages to them. Therefore, if no crime of bank fraud or misapplication has been proved, it follows that money laundering cannot be proved, as a matter of law. It would be simple to say, that because the Court has found that the stated underlying crimes were not committed, these charges also fail. However, there is more to be said here.

There is no statutory requirement that the Oxford defendants reveal to the bankers or the regulators the source of their funds. The theory behind the Money Laundering Act is that the disbursement of any specified unlawful proceeds impedes the governments efforts to accumulate information germane to the underlying crime. The Act seeks to punish obstruction of justice; the hiding of the evidence of the crime.

Here, the defendants left a clean paper trail so well defined that the regulators could follow it. No unusual transactions occurred and no obfuscation of the funds can be proved. In short, there was no concealment revealed that is not protected by the Fourth and Fifth Amendments to the federal Constitution. These counts in the indictment are without foundation and shall be dismissed.

Criminal Forfeiture:

Finally, the indictment seeks criminal forfeiture of the proceeds derived from the asserted unlawful transactions pursuant to Title 18 U.S.C. § 982. This statute permits criminal forfeiture of property that is derived from proceed traceable to a violation of banking statutes. Because no crime has been proved in the 26 count

indictment, count twenty-seven the forfeiture count, fails for lack of substance. The Court turns next to the defendants' motion to suppress.

II.

Previously, the Court denied the defendants' motion to suppress because the Court determined that, even if the affiant, FBI Agent Tom Conlon, included false statements in his affidavit for search warrant, there was sufficient other evidence to support probable cause for its issuance. The affiant, through mischief or a lack of knowledge, was mistaken on the law. That mistake did not negate the possibility that evidence existed establishing that the defendants intended to commit the crimes that were ultimately charged. Therefore, the Court denies the motion to suppress.

III.

Next, the Court turns to the defendants' third motion to dismiss based on prosecutorial misconduct. In two previous hearings, the first and second motion to dismiss, the Court found that:

> a) the Court ordered the delivery of *Brady* material far in advance of trial (see document numbers 131, 187, 200 and 343);
>
> b) the *Brady* materials in question are constituted of FBI 302 reports and Grand Jury testimony of *witnesses* whose testimony or statements support the defendants' theory of the case and refutes that of the government;
>
> c) the government failed in its duty to be forthright in the disclosure of *Brady* materials;

d) the government failed to produce, within a reasonable time, what it considered questionable materials so that the case could be appropriately administered and the rights of the defendants could be protected;

e) the government intentionally failed or refused to comply with the law, by asserting, disingenuously, that impeachment materials do not constitute *Brady* but instead *Giglio* and, therefore, denied any obligation to tender the documents in accordance with *Brady; See Brady v. Maryland,* 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215] (1963); *see also, Williams v. Dutton,* 400 F.2d 797 (5th Cir. 1968) *cert. denied,* 393 U.S. 1005 [1105, 89 S.Ct. 908, 21 L.Ed.2d 799] (1969).

f) the failing of the government, in its duty under the federal Constitution to not violate the Sixth Amendment rights of the defendants to a fair and open trial, prevented the defendants from making an appropriate opening statement rebutting the government's theories of prosecution;

g) the government made misrepresentations of facts to the Court that Robert Creighton was not "taking any drugs" in response to charges by the defendants that Creighton was possibly on psychotic drugs. The facts show that not only had Creighton been hospitalized for a psychotic episode but was currently taking a psychotic drug. At the very least, this conduct was reckless. At most, it as intended as a laud on the Court. (See trial transcript).

h) the government made misrepresentations of facts, or at least gave misleading facts, to the Court regarding

instructions given to a witness, Keith Franze. In this regard, the government stated that no one ever "instructed him [Franze] not to talk to [anyone]." Franze testified that "they suggested that I not [talk] with the defendants in the case." "[I]t would be best if I [Franze] avoid them." (See trial transcript)

The Court has since determined that:

a) a comparison of the 302 statements of witnesses to the same witnesses' Grand Jury testimony is revealing. The FBI agent took extensive liberties, choosing conclusionary words that caused the statements to fit within the government's theory of the case. Assuming that this conduct was merely overzealousness, the error was exposed during the Grand Jury testimony of the same witnesses. Without doubt, this disparity came to the United States Attorney's attention because, the tone and tenor of the questioning of the witnesses before the Grand Jury is also revealing, to say the least.

b) the Court was required to review at least eight (8) transcripts of the Grand Jury testimony, determining in each of the eight, that the testimony was wrought with statements that both, supported the defendants' theory of the case and foiled that of the government, with few exceptions.

c) the testimony of Jim Carpenter, Carmen Cooper, Robert Creighton, Walter Fagan, Anthony Gullo, Fred Haas, Leland Jones, Mary Ellen Kallmeyer, David Gumm and several others,

called or not by the government, supports the defendants' claim of innocence. (See 3rd motion to dismiss in response to *Brady* violations).

d) the government's contentions of equal access, neutral evidence, that the defendants were aware of the information possessed by the Grand Jury, that the testimony was merely impeachment, and that they acted in good faith, is incredible. Only a person blinded by ambition or ignorance of the law and ethics would have proceeded down this dangerous path.

Here, it appears that the duty and obligation of the government to not prosecute where the evidence at best is disputed, leaves the defendants' Sixth Amendment right to a fair trial snared on the branches of strange and subverted truth. *See Berger v. United States*, 295 U.S. 78, 55 S.Ct. 6299 79 L.Ed. 1314 (1935). A fundamental principle of reciprocity dictates that there can be no liberty or justice for any one of us except, that there is liberty and justice for all. Each of us has a separate and distinct duty to guard these fundamental principles.

It is ORDERED that the monetary sanctions entered earlier in this case are withdrawn for all times, and the defendants' Third Motion to Dismiss, because of prosecutorial misconduct, and Motion to Dismiss pursuant to FRCP 29 are GRANTED.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAWRENCE H. RAMMING, *et al.*, *Plaintiff,* versus UNITED STATES OF AMERICA, *Defendant,*	§ § § § § § §	CIVIL ACTION NO. H-99-4359

ORDER
[Entered: July 27, 2000]

Pending before the Court is Defendant's Rule 12(b)(1) and 12(b)(6) Motion to Dismiss Ramming's First Amended Complaint (Instrument No. 7). Having considered the submissions of the parties and the applicable law, the Court finds that Defendant's motion should be **GRANTED.**

I.

Plaintiff Lawrence H. Ramming ("Ramming") brings this action against Defendant the United States ("the Government"), alleging malicious prosecution, wrongful interference, and damages arising out of a grand jury indictment of Ramming, his subsequent trial, and acquittal.

In 1994, pursuant to a Government investigation, a grand jury indicted Ramming and several co-defendants in a 27-count indictment for conspiracy to defraud banks, bank fraud, wire fraud, bank larceny, bank bribery, misapplication of bank funds, false entries in bank records, and money laundering. Trial was conducted from November 1995 through January 1996. In January 1996, the defendants moved for *dismissal* of the indictment and

acquittal pursuant to Fed. R. Crim. P. 29, based upon prosecutorial misconduct. Judge Hoyt granted the motions to dismiss and acquit, finding, *inter alia*, that the Government engaged in prosecutorial misconduct by failing to disclose *Brady* materials, and that the FBI agent's testimony was inconsistent with his testimony before the grand jury. *United States v. Ramming*, 915 F. Supp. 854, 868 (S.D.Tex. 1996).

Paul Licata ("Licata") and John Thomas Cloud ("Cloud") were two of Ramming's codefendants. Licata filed suit for malicious prosecution in the Southern District of Texas on January 13, 1997. *Licata v. USA*, No. 97-0093. Cloud filed suit for malicious prosecution in the Southern District of Texas on December 30, 1999. *Cloud v. USA*, No. 99-4550. In the *Licata* case, Judge Hughes ordered the Government to release the grand jury transcripts that led to the original indictment in 1994. In December 1998, Licata submitted the grand jury transcripts indicting him and his co-defendants into the record in support of his claim for malicious prosecution. Judge Hughes held a bench trial December 8-10, 1998. Before Judge Hughes entered a judgment, the parties settled. Cloud and Ramming's civil suits were consolidated in this Court on April 11, 2000. (Instrument No. 12).

On February 5, 1999, Ramming presented his administrative claim for malicious prosecution to the United States Department of Justice. Ramming supplemented that claim on May 21, 1999, and the United States Department of Justice denied Ramming's administrative claims on October 20, 1999.

On December 14, 1999, Ramming filed this action against the United States for malicious prosecution, wrongful interference, and damages pursuant to the law enforcement exception of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2674.

On March 21, 2000, the Government filed this motion to dismiss for lack of jurisdiction and for failure to state a claim, arguing that Ramming failed to timely file his suit within the applicable two-year statute of limitations.

II.
A.

"A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *See Home Builders Ass'n of Miss. Inc. v. City of Madison*, 143 F. 3d 1006, 1010 (5th Cir. 1998). A district court may dismiss an action for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) on any one of three separate bases: (1) the complaint alone, (2) the complaint supplemented by undisputed facts evidenced in the record, or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Barrera-Montenegro v. United States*, 74 F.3d. 657, 659 (5th Cir. 1996); *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1384 (5th Cir. 1989). In examining a Rule 12(b)(1) motion, the court is empowered to consider matters of fact which are in dispute. *See Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981). The party asserting jurisdiction bears the burden of establishing it, when the court's subject matter jurisdiction is challenged. *See Boudreau v. United States*, 53 F.3d 81, 82 (5th Cir. 1995). However, any uncontroverted facts in the complaint must be accepted as true. *Gaubert v. United States*, 885 F.2d 1284, 1285 (5th Cir. 1989), *rev'd on other grounds*, 111 S.Ct. 1267 (1991). Moreover, the Court must construe the complaint broadly and liberally. *Gaubert*, 885 F.2d. at 1285.

When a Rule 12(b)(1) is filed in conjunction with other Rule 12 motions, the court should usually consider in: rule 12(b) (1) jurisdictional attack before addressing any attack on the merits. *Hitt v. Pasadena*, , 561 F.2d 606, 608 (5th Cir. 1977); *Kunihiko Iwata v. Stryker Corp.*, 59 F. Supp. 2d 600,

602 (N. D. Tex. 1999). This requirement prevents a court without jurisdiction from prematurely dismissing a case with prejudice. *Id.*. The court's dismissal of a plaintiff's case because the plaintiff lacks subject matter jurisdiction is not a determination of the merits and does not prevent the plaintiff from pursuing a claim in a court that does have proper jurisdiction. *Id.* A. lack of subject matter motion to dismiss under Rule 12(b)(1) should be granted, "only if it appears that the plaintiff cannot prove any set of facts in support of his claim that would entitle him, to relief " *See Home Builders Assn of Miss., Inc. v. City of Madison, Miss.*, 143 F. 3 d 1006, 1010 (5th Cir. 1998) *(citing Benton v. United States, 960* F. 2d 19, 21 (5th Cir. 1992)); *Santerre v. AGIP Petroleum Co.*, 45 F.Supp. 2d 558, 565 (S.D. Tex. 1999).

B.

Rule 12(b)(6) allows for dismissal if a plaintiff fails "to state a claim upon which relief may be granted. " Such dismissals, however, are rare, *Clark v. Amoco Production Co.*, 794 F. 2d 967, 970 (5th Cir. 1986), and only, granted where "it appears beyond doubt that the plaintiff can prove no set of facts ha support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957), Dismissal can be based either on a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990); *Vines v. City of Dallas, Texas*, 851 F. Supp. 254, 259 (N.D. Tex. 1994), *aff'd*, 52 F.3d 1067 (5th Cir. 1995).

In determining whether a dismissal is warranted pursuant to Rule 12(b)(6), the Court accepts as true all allegations contained in the plaintiff's complaint. *Gargiul v. Tompkins*, 704 F.2d 661, 663 (2d Cir. 1983), *vacated on other grounds*, 465 U.S. 1016 (1984); *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983) In addition, all reasonable inferences are to be drawn in favor of the

plaintiff's claims. *Id.* "To qualify for dismissal under Rule 12(b)(6), a complaint must on its face show a bar to relief. " *Clark*, 794 F.2d at 970.

III.

The Government contends that Ramming's claims must fail because they are barred by the statute of limitations of the FTCA. The FTCA. provides a limited waiver of the sovereign immunity of the United States Government. The FTCA is also a grant of jurisdiction to federal court in those cases where the Government has waived immunity and has consented to be sued in certain situations. Ramming filed this action for malicious prosecution, wrongful interference, and damages pursuant to the law enforcement exception to sovereign immunity, 28 U. S. C. §2671.

A prerequisite to the commencement of an action against the United States in federal court in an administrative claim. *Brown v. NationsBank Corp.*, 188 F.3d 579, 589-90 (5th Cir. 1999). The FTCA provides that, plaintiff must present an administrative claim to the appropriate federal agency within two years of the claim's accrual or the claim is barred:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b).

Ramming was acquitted on January 12, 1996. Ramming presented his administrative claim to the Department of Justice on February 5, 1999. The Department of Justice denied the claim on October 20, 1999.

The crux of the dispute in this case is determining when Ramming's causes of action accrued. Ramming contends that his claims accrued and the. limitations period began only when he learned of the contents of be grand jury transcripts released during Licata's trial in December 1998. The Government argues that the claims accrued and the limitations period began when Ramming was acquitted, in January 1996.

A cause of action under federal law accrues within the meaning of § 2401(b) "'when the plaintiff knows or has reason to know of the injury which is the basis of the action'" *Brown*, 188 F. 3d at 589-90 *(quoting Moore v. McDonald*, 30 F. 3d 616, 620-21 (5th Cir. 1994)). In *Brown*, the Fifth Circuit noted that the plaintiff's knowledge of his injury depends upon two elements: "1) the existence of the injury; and (2) the connection between the injury and the defendant's actions." 188 F. 3d at 590 *(citing Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995)). "Moreover, a plaintiff need not have actual knowledge" of the injury "if the circumstances would lead a reasonable person to investigate further." *Piotrowski*, 51 F. 3d at 516 (citations omitted).

Before a malicious prosecution can accrue, an underlying criminal proceeding must terminate in a plaintiff's favor. *See Heck v. Humphrey*, 114 S.Ct. 2364, 2374 (1994); *see also* TEX. CIV. PRAC. & REM. CODE, § 16.002(a) ("For purposes of malicious prosecution actions, prosecution end, and cause of action accrues, when formal criminal proceedings are terminated"). Judge Hoyt's opinion granting Ramming's motion to dismiss and for acquittal was issued on January 12, 1996, thereby terminating the proceeding in Ramming's favor. *See Ramming*, 915 F. Supp. at 857.

Ramming's injury stems from the behavior of AUSA Hyman and FBI Agent Conlon before the grand jury, which resulted in an indictment against Ramming which could not be substantiated by the evidence according to Judge Hoyt. As Ramming himself states, "there is no question that the plaintiff knew of his injury when he was wrongfully indicted, wrongfully tried and rightfully acquitted." (Plaintiff's Response, Instrument No. 18, at 4). The question, then, arises with the second prong of the accrual test: when Ramming was put on notice of "the connection between the injury and the defendant's actions."

Ramming claims "that it was not until December, 1998, when Plaintiff first had access to the transcripts of all proceedings before the (Grand Jury which indicted him and the 1998 testimony of the FBI case agent, that he knew (as opposed to believed) that the actions of lead Assistant United States Attorney ("A.U.S.A.") Hyman and FBI Agent Colon 'inflicted the injury' to him." (Plaintiff's Response, Instrument No. 18, at 5). Ramming argues that only once he had read the transcripts could he have known, "in the exercise of reasonable diligence, of the 'connection' between his injury and the wrongful actions" of AUSA Hyman and Agent Conlon. (Plaintiffs Response, Instrument No. 18, at 5).

The Government contends that Ramming should have learned of the connection between his injury and the Government's actions upon his acquittal on January 12, 1996. "The district court in plaintiff's criminal case specifically pointed out discrepancies between the FBI's 302 witness statements and the grind jury testimony of the witnesses, and found that the prosecution did not act in good faith in failing to make Brady (exculpatory evidence) material available." (Defendant's Reply, Instrument No. 24, at 6). The Government asserts that if Ramming had "diligently" investigated and sought legal advice as Licata did in asking for the grand jury transcripts, Ramming's claim would have been timely. (Id.).

The Court finds the Government's reasoning, persuasive. A claim under the FTCA accrues when the plaintiff learns he has been injured, not when the plaintiff learns of the legal or proximate cause of his injury. *See United States v. Kubrick*, 100 S.Ct. 352, 360 (1979) (accrual of a cause of action does not await plaintiff's awareness that the injury was negligently inflicted, but, rather, plaintiff armed with fact is not excused from failure to seek advice as to whether its legal rights have been invaded). Accordingly, Ramming's claims accrued when he learned that the behavior of the AUSA and FBI agent during the grand jury proceedings resulted in his "wrongful" indictment and prosecution. *See id.*

Ramming first learned that the Government had engaged in suspect behavior before the grand jury when Judge Hoyt issued his decision on January 12, 1996. Ramming argues that "bad acts by Defendant, after Plaintiff was indicted by the Grand Jury, did not furnish Plaintiff with evidence of a cause of action for malicious prosecution. Only the Government's conduct prior to the indictment, which was kept secret by the Gand Jury proceedings, provided Plaintiff with a claim. . . . " (Plaintiff 's Response, Instrument No. 18, at 11). Ramming cites a Texas Supreme Court case to support his position that only the Government's actions prior to his indictment are relevant to determining accrual of his claim. In *Akin v. Dahl*, a father, the trustee of his deceased wife's estate, sued his daughter for having him declared incompetent and hospitalized. 661 S.W.2d 917 (Tex. 1983). Subsequent to his hospitalization, the father was found mentally competent at a competency hearing. The father then filed suit against the daughter for malicious prosecution and won. The appeal turned on whether there was a lack of probable cause for instituting the guardianship and commitment proceedings, and what actions were relevant to determining probable cause. The court found that:

> [e]vents subsequent to the action of confinement and legal proceedings may tend to show whether the action of the Akins [daughter and husband] turned out to be correct or incorrect, but is not material to the beliefs and motives at the time the proceedings were instituted. It is the events prior to the institution of the proceedings which must be examined, and only those events, to determine if the defendants bad probable cause to act.

Akin, 661 S.W.2d at 920 (internal citations omitted). Here, Ramming argues that the Government's "egregious" conduct after his indictment is irrelevant. "At that time, Plaintiff was obviously aware of the bad acts of AUSA Hyman during the criminal trial. However, at that point, Plaintiff had already suffered his 'injury,' *i.e.*, AUSA Hyman's conduct during the Grand Jury proceeding, coupled with that of FBI Agent Conlon." (Plaintiff's Response, Instrument No. 18, at 12) (emphasis in original).

Even if the Court focuses on the Government's acts leading up to Ramming's indictment and deems irrelevant the Government's actions at his trial, Ramming still had notice of the wrongful acts of the AUSA and Agent Conlon during the grand jury proceedings when Judge Hoyt's opinion was published on January 12, 1996. Ramming quotes an extensive portion of Judge Hoyt's decision, in which Hoyt castigated AUSA Hyman for prosecutorial misconduct at trial, such as withholding Brady materials and failing to produce evidence. (Plaintiff's Response, Instrument No. 18, at 10). However, Judge Hoyt also discussed the fact that the AUSA and Agent Conlon's behavior at the grand jury proceeding was suspect:

> a comparison of the 302 statements of witnesses to the same witnesses' Grand Jury testimony is revealing. *The FBI agent took extensive liberties, choosing conclusory words that caused the statements to fit within the government's theory of the case.* Assuming that this conduct was merely overzealousness, *the error was exposed during the Grand Jury testimony of the same witnesses. Without a doubt, this disparity came to the United States Attorney's attention because, the tone and tenor of the questioning of the witnesses before the Grand Jury is also revealing,* to say the least.

Ramming, 915 F.Supp. at 868 (emphasis added). Judge Hoyt clearly calls attention to the behavior of the AUSA and the testimony of the FBI agent *during the grand jury proceedings.* At this point, Ramming was on notice that the testimony of the Government's witnesses and the behavior of the AUSA and FBI before the grand jury bordered on misconduct.

Ramming argues that nevertheless, "even if Plaintiff *believed* that Hyman and Conlon crossed the line between zealous advocacy and legal malice during the Grand Jury proceedings, he had no way to *know* that until December, 1998, when for the fast time he had access to the Grand Jury transcripts. . . . " (Plaintiff's Response, Instrument No. 18, at 13) (emphasis in original). Ramming devotes two pages of his response to his attempt to distinguish between "belief" and "knowledge." (See Plaintiff's Response, Instrument No. 18, at 6-8). Even if the Court assumes, as it must, that in January 1996 Ramming merely 'believed" that the Government had engaged in misconduct during the grand jury proceedings, and did not "know" for a fact, he apparently made no effort to ascertain the truth as to what did occur at the grand jury proceedings. Ramming was represented by counsel in the criminal prosecution, and again by the same attorney in this case. That attorney, or

other counsel of Ramming's choice, could have filed suit against the United States for malicious prosecution in good faith upon Ramming's acquittal. Had Ramming's attorney done so, he could have used the discovery process to determine the extent of the damage or injury to Ramming and petitioned a court to release the grand jury transcripts as Licata did.

Ramming has not described any efforts he made to obtain the grand jury transcripts of his own volition. Ramming claims that, "[p]rior to the introduction into evidence of those Grand Jury transcripts and Agent Conlon's testimony in the *Licata* trial, Plaintiff did not know and could not have learned the cause of his injury." (Plaintiff's Response, Instrument No. 18, at 11). However, on certain occasions plaintiffs have successfully petitioned Texas courts for release of grand jury transcripts in cases where, 'in be judgment of the court, it became material to the administration of justice that disclosure be allowed. " *Stem v. State ex rel. Ansel,* 869 S.W.2d 614 (Tex. App.-- Houston [14th Dist] 1994, writ denied); *Euresti v. Valdez,* 769 S.W.2d 575, 582 (Tex.App.-- Corpus Christi 1989, no writ) (grand jury testimony may be divulged to prove elements of malicious prosecution). Likewise, after reading Judge Hoyt's decision, Ramming could have either investigated the matter and petitioned the court to release the grand jury transcripts. Yet, Ramming took no such action, and waited until Licata pursued the matter on his own and obtained the transcripts in December 1998, almost three years after Ramming's acquittal.

Judge Hoyt's decision acquitting Ramming discussed the fact that the AUSA and FBI agent had distorted the grand jury testimony of Government witnesses by 'caus[ing] the statements to fit within the government's theory of the case." *Ramming,* 915 F.Supp. at 868. Such language put Ramming on notice that his indictment may have been improper, and thus his malicious prosecution

and other claims accrued on January 12, 1996, The two-year statute of limitations thereby expired on January 13, 1998. *See* 28 U.S. C. § 240 1 (b). Accordingly, Ramming's claims are time-barred.

IV.

Defendant's Motion to Dismiss is **GRANTED.**

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED this the 26th day of July, 2000, at Houston, Texas.

\ s\ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 01-20079

JOHN THOMAS CLOUD,,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Texas
Houston Division
(H-99-CV-4359)

ON PETITION FOR REHEARING

[Entered: February 18, 2002]

(Opinion 12/19/2001, 5 Cir., 2001, 281 F.3d 158)

Before SMITH and EMILIO M. GARZA, Circuit Judges, and CUMMINGS, District Judge.

PER CURIAM:

The petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ _____